(1) No. 021432 MAR 26 2003

IN THE
Supreme Court of the United States

DANIEL HEIMMERMANN AND EMILY HEIMMERMANN, BOTH INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

FIRST UNION MORTGAGE CORPORATION,
Respondent.

BETH A. RICHARDSON
AND
PAMELA C. HIRSCH, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, DAVID L. HIRSCH,
Petitioners,

v.

BANKAMERICA CORPORATION, A DELAWARE CORPORATION, BANK OF AMERICA FSB, INC., A HAWAII CORPORATION, BANKAMERICA MORTGAGE, A DIVISION OF BANKAMERICA FSB, A HAWAII CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit erred, in conflict with seven other circuits that have denied agencies the authority to use policy pronouncements to overrule circuit precedent, in according *Chevron* deference to an informal Department of Housing and Urban Development policy statement, which sought expressly to overrule circuit precedent holding that the interpretation the agency adopted was both contrary to the clear language and an unreasonable interpretation of the statute.

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PETITION FOR A WRIT OF CERTIORARI

Daniel and Emily Heimmermann, Beth Richardson, and Pamela and David Hirsch, on their own behalf and on behalf of all others similarly situated, respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eleventh Circuit in these two cases.

OPINIONS BELOW

The opinion of the court of appeals in *Heimmermann v. First Union Mortgage Corp.* (Pet. App. 1a-11a) is reported at 305 F.3d 1257. The opinion of the court of appeals in *Richardson/Hirsch v. BankAmerica Corp.* (Pet. App. 12a-13a) is not reported. The opinion of the district court in *Heimmermann* (*id.* at 14a-22a) is reported at 188 F.R.D. 403. The opinion of the district court in *Richardson/Hirsch* (Pet. App. 23a-28a) is not reported.

JURISDICTION

The judgments of the court of appeals in *Heimmermann* and *Richardson/Hirsch* were entered on September 18, 2002, and January 24, 2003, respectively. On November 26, 2002, a petition for rehearing in *Heimmermann* was denied. Pet. App. 29a-30a. On February 20, 2003, Justice Kennedy extended the time for filing a petition in *Heimmermann* until March 26, 2003. *Id.* at 33a. On March 17, 2003, a petition for rehearing in *Richardson/Hirsch* was denied. *Id.* at 31a-32a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

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[1] As the Eleventh Circuit itself realized when it calendared these cases together for oral argument, the issue in these cases is substantially the same. As a result, petitioners are filing a single petition for certiorari even though the lawsuits proceeded independently at earlier stages of the litigation. *See* Sup. Ct. R. 12.4; *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 598 n.1 (1981); *see generally* Robert L. Stern *et al.*, *Supreme Court Practice* 400 (8th ed. 2002) ("Stern, *Supreme Court Practice*") (noting preference of this Court for joint petitions for identical questions arising from the same appellate jurisdiction).

STATUTES, REGULATIONS, AND RULES INVOLVED

Pertinent sections of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §§ 2601 *et seq.*, the regulations implementing RESPA, 24 C.F.R. Pt. 3500, and Federal Rule of Civil Procedure 23 are reproduced at Pet. App. 34a-77a.

INTRODUCTION

This case concerns an inexplicable and indefensible court of appeals decision on an administrative law issue of surpassing importance and involving a subject that affects millions of consumers who obtain home mortgage financing. In 2001, after hearing argument on the same day as the cases that are consolidated in this petition, the Eleventh Circuit held that consumers could form a class action to challenge the legality of certain lender payments to mortgage brokers, known as yield spread premiums, under the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. § 2607(a), (c), which expressly prohibits referral fees and other types of kickbacks. *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324, 1332 (11th Cir. 2001) ("*Culpepper III*"), *cert. denied*, 534 U.S. 1118 (2002).

Alarmed that they could be subject to civil liability for a widespread practice of bilking consumers in direct contravention of federal law, lenders strenuously lobbied the Department of Housing and Urban Development ("HUD") for relief. The agency, acting through an Assistant Secretary, responded with a hastily put-together and brazen policy statement that expressed its open disagreement with the Eleventh Circuit's decision in *Culpepper III* and the Seventh Circuit's nearly contemporaneous decision in *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001), which had addressed a claim brought under RESPA § 8(b), 12 U.S.C. § 2607(b). That 2001 Policy

Statement[2] was promulgated without notice-and-comment rulemaking, does not purport to construe a single term in RESPA, is devoid of analysis, conflicts with prior agency pronouncements on the same subject, and, with respect to the yield spread premium payments at issue here, was disavowed by the agency in relevant part a mere nine months later. Nonetheless, it was deemed by the Eleventh Circuit to be so authoritative as to warrant *Chevron* deference and to require the overruling of its prior decision in *Culpepper III*.

The decisions below, which expressly followed a prior Eleventh Circuit decision on whether an agency's policy pronouncements can overrule circuit precedent, directly conflict with the decisions of seven other circuits that hold that agencies lack that authority. Moreover, in direct conflict with the Eleventh Circuit decisions challenged here, the Seventh Circuit has recently held that the very same 2001 Policy Statement was not entitled to *Chevron* deference and that HUD had not, as a result of that statement, overruled *Echevarria*. *See Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002). Given that deep and mature conflict, and the express disagreement by the Seventh Circuit with the Eleventh Circuit as to the very same agency statement, this Court's review is plainly warranted.

STATEMENT

A. Factual Background

1. Congress enacted RESPA in 1974 to combat widespread use of kickbacks in the residential real estate market, which Congress found to increase unnecessarily the cost of home ownership. In 1992, Congress amended RESPA to include mortgage brokers within its ambit. *See* 12 U.S.C. § 2602(3). Section 8(a) of RESPA provides that

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[2] *Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)*, 66 Fed. Reg. 53052 (2001) ("2001 Policy Statement").

"[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." *Id.* § 2607(a). Section 8(c)(2) provides that "[n]othing in [§ 8] shall be construed as prohibiting . . . the payment . . . [of] compensation . . . for services actually performed." *Id.* § 2607(c)(2). Violations of § 8(a) are subject to both criminal sanctions and civil penalties, including a private right of action. *See id.* § 2607(d).

2. In March 1997, Beth Richardson's broker arranged for her to obtain a 15-year, fixed rate, $30,000 mortgage loan from BankAmerica, at a rate of 8%. Richardson paid her broker $1,160 in various charges the broker assessed for procuring this loan. *See* Pet. App. 91a (Richardson HUD-1 Form (lines 801-804, 809-810)). Unbeknownst to Richardson, the interest rate for her loan was above the "par," or market, rate that BankAmerica offered on that day for the loan she obtained. The available interest rates from BankAmerica were set forth on a rate sheet, which BankAmerica sent to its affiliated brokers on a daily basis, if not more frequently. Those sheets list a series of interest rates available for different loan types and inform brokers of the yield spread premiums and other incentive bonuses if the broker refers the loan to that lender. These rate sheets expressly state that they should not be made available to consumers. *See id.* at 86a ("This document . . . is not intended for nor should it be provided to the general public."). The lender's insisted-upon secrecy is presumably so that consumers will not know that they are, in fact, paying above-par interest rates so that the broker the consumer approached to obtain a loan can receive a special payment from the lender (the yield spread premium) in exchange for steering the consumer's loan to that lender.

In the case of Richardson's loan, the 8% interest rate was substantially above the market rate on that day for

the type of loan Richardson obtained.[3] As a result of the higher interest rate, BankAmerica paid the broker a yield spread premium of 2% of the total amount of the loan, or $600. *See id.* at 91a (line 811).[4] There is no indication on Richardson's federally mandated HUD-1 form that this additional $600 was used to offset any amounts owed to the broker for services provided to Richardson. *See, e.g., id.* at 90a (lines 200-209, "Amounts Paid . . . In Behalf Of Borrower").[5] According to BankAmerica's Wholesale Operating Guide, if that $600 yield spread premium had in fact been used as a "credit towards non-recurring closing costs" that Richardson owed to the broker, it should have appeared on line 205 of the HUD-1 form. *Id.* at 103a-104a, 106a-108a. The fact that it was not so denomi-

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[3] The BankAmerica rate sheet from the day Richardson "locked in" her loan is reproduced at Pet. App. 86a-88a. The par rate (indicated by the figure "0.000") for a 15-year fixed conforming loan (the loan product Richardson obtained) on that date was 7.375%. *See id.* at 86a, 89a.

[4] "Yield spread premium" is the name given by the lender to the referral bonus or premium paid to the broker for the above-par loan. Such payments are sometimes called "premium payments" or "service-release premiums." The yield spread premium was calculated as follows: according to the rate sheet, the premium to be paid for an 8% interest rate for the loan product Richardson obtained (15-year fixed conforming loan, 30-day lock in) is "-2.250," or 2.25% of the value of the loan. *See* Pet. App. 86a. However, the rate sheet further provides that the premium will be reduced by 0.25% for any loan less than $125,000, resulting in a yield spread premium of 2%. *See id.* ("Ln Amts <$125,000, add to price .25 pts").

[5] By statute, the HUD-1 form must "conspicuously and clearly itemize all charges imposed upon the borrower." 12 U.S.C. § 2603(a); *see also* 24 C.F.R. Pt. 3500 App. A (HUD-1 form is to contain "statement of actual charges and adjustments"). According to Richardson's HUD-1 form, the $1,160 she paid to her broker covered all "actual charges" for services rendered by the broker. *See* Pet. App. 91a (lines 801-810). Specifically, those charges included $500 for loan origination, $75 for a loan "discount" (notwithstanding that her interest rate was *not* discounted, but was 0.625 percentage points *above* par), $200 for processing, a $300 appraisal fee, a $60 credit report fee, and a $25 courier fee. There is no indication on the form — as required by federal law — that the broker's fee for the services performed on her behalf was actually $1,760, of which BankAmerica paid $600.

nated indicates that the $600 was taken by the broker as profit beyond the amount the broker disclosed it was charging to Richardson. *See id.* at 108a.

Like Richardson, the Hirsches, the Heimmermanns, and each of the potential members of the classes obtained above-par loans from BankAmerica and First Union. In each case, the relevant facts are similar — the broker was paid a yield spread premium that, as indicated on the HUD-1 forms, did not offset any costs that the borrower owed, but instead was taken by the broker as a fee for referring the loan to the lender. *See id.* at 80a (line 811).

B. Proceedings Below

1. Richardson, on her own behalf and as a class representative, filed a complaint in the district court for the Northern District of Georgia alleging that respondent BankAmerica violated RESPA § 8(a) by paying yield spread premiums to mortgage brokers in connection with her and the class members' home loans. The Hirsches and the Heimmermanns filed similar suits against BankAmerica in the Northern District of Georgia and against First Union in the Northern District of Alabama, respectively. In all three cases, the petitioners argued that class certification was appropriate because the claims involved alleged violations of a federal statute based on common issues of law and fact related to the lenders' established business practices, as evidenced by the standard contracts and uniform courses of conduct between the lenders and mortgage brokers, other corporate documents, and the testimony of the lenders' managers and agents.

On April 20, 1999, the Georgia district court denied Richardson's and the Hirsches' motions for class certification, concluding that, because "payment of a yield spread premium is not a per se violation of RESPA section 8, certification would require analysis of each of the individual transactions . . . to determine whether any of the . . . payments were not reasonably related to the value of the services actually performed." Pet. App. 26a-27a (internal quotations and citation omitted). On August 13, 1999,

however, the Alabama district court granted the Heimmermanns' motion for class certification, finding that "the loans and transactions which constitute the basis for the potential class action will not require individual evaluation" to determine whether the "payments [made] relate to the services provided by the broker." *Id.* at 17a, 20a.

2. The Eleventh Circuit took jurisdiction under Federal Rule of Civil Procedure 23(f) over appeals from the class certification decisions in *Richardson/Hirsch* and *Heimmermann*, and set them for argument with two other cases in which district courts respectively granted and denied class certification motions in yield spread premium cases: *Culpepper v. Irwin Mortgage Corp.*, No. 99-13725 (11th Cir.), and *McBride v. ReliaStar Mortgage Corp.*, No. 99-12110 (11th Cir.). All four cases were argued together on January 23, 2001.[6] Of the four cases, *Culpepper* had previously been before the Eleventh Circuit. In that earlier decision, the court of appeals held that the yield spread premium that the lender paid to the broker "was a prohibited referral fee under RESPA." *Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692, 697 (11th Cir.) ("*Culpepper I*"), *reh'g denied*, 144 F.3d 717 (11th Cir. 1998) ("*Culpepper II*"). In reaching that decision, the Eleventh Circuit interpreted the text of RESPA itself, finding no ambiguity in the statute and noting that it was "duty-bound to apply RESPA as written." *Culpepper II*, 144 F.3d at 719. Interpreting § 8(a), the court held that "RESPA is violated if (1) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement business and (3) a referral actually occurs," "unless the payment falls within one of the exceptions listed in

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[6] After the Eleventh Circuit took jurisdiction over *Richardson/Hirsch*, but before oral argument, the Georgia district court ruled on cross-motions for summary judgment, granting summary judgment to BankAmerica in *Hirsch* and denying both parties' motions for summary judgment in *Richardson*. Petitioner's appeal of the summary judgment decision in *Hirsch* was set for oral argument on January 23, 2001, along with the four other yield spread premium cases. The Eleventh Circuit still has not issued a decision in *Hirsch*.

[§ 8(c)]." *Culpepper I*, 132 F.3d at 695-96. Turning to § 8(c), the court found that the lender's yield spread premiums did not fall within the statutory exception for payments "for services actually performed," 12 U.S.C. § 2607(c)(2), because they were "not tied to the quantity or quality of the services that [the broker] provided." *Culpepper I*, 132 F.3d at 697.

In March 1999, in response to *Culpepper I* and *II* and pursuant to a request in a congressional conference committee report,[7] HUD issued an informal policy statement in which it set forth a test for determining the legality of a yield spread premium.[8] HUD's test consisted of two parts: (1) whether "services were actually *performed for the compensation paid*" and (2) whether "the payments are reasonably related to the value of the . . . services that were actually performed." 64 Fed. Reg. at 10084 (emphasis added).

After the issuance of the 1999 Policy Statement, the cases at issue here worked their way to the court of appeals (and *Culpepper* was also appealed after remand proceedings on class certification). On June 15, 2001, the Eleventh Circuit issued its decision in *Culpepper III*. The court held that a class could be certified to challenge lender payments of illegal yield spread premiums. The court rejected the lender's argument that, notwithstanding the court's prior interpretation of RESPA § 8(a) and (c), under HUD's 1999 Policy Statement a yield spread premium is legal as long as the broker provided *some*

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[7] In a report accompanying an appropriations bill, the "conferees direct[ed] HUD to clarify its position on lender payments to mortgage brokers within 90 days after the enactment of this appropriation Act." H.R. Conf. Rep. No. 105-769, at 260 (1998), *reprinted in* 1998 U.S.C.C.A.N. 539, 568.

[8] *See Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers*, 64 Fed. Reg. 10080 (1999) ("1999 Policy Statement"). The 1999 Policy Statement was not issued pursuant to notice-and-comment rulemaking and did not purport to interpret any ambiguous statutory terms.

services and the total payment the broker received was reasonable, regardless of whether the premium was a payment in exchange for any services actually rendered. *See* 253 F.3d at 1328-29.

First, the court held that the lender's interpretation "simply does not fit the language" of the 1999 Policy Statement, which required that services be performed "for the compensation paid." *Id.* at 1329 (internal quotations omitted). Indeed, the court rejected the lender's position that, under the 1999 Policy Statement, it is irrelevant whether the yield spread premium was paid in exchange for services rendered because that interpretation "is impossible [under] our, and possibly any ordinary, use of the English language." *Id.* Second, the court held that the lender's interpretation "would make the [1999 Policy] Statement clash with § 8(c)'s language," which the court had already interpreted to cover "only payments whose reason is compensation for services." *Id.* at 1329-30. Finally, the court held that the lender's interpretation would result in the 1999 Policy Statement "creat[ing] an inconsistency between § 8(a)'s liability test and § 8(c)'s exclusion from liability," by impermissibly reading the latter provision "to bless conduct that § 8(a) plainly outlaws." *Id.* at 1330.

Accordingly, the court reaffirmed its interpretation of RESPA § 8 in *Culpepper I* and *II*, and affirmed the district court's decision to grant the motion for class certification in light of evidence that the lender uniformly paid yield spread premiums "according to terms and conditions common to all the loans." *Id.* at 1331-32. Under normal appellate practice — and much as this Court rapidly issues "grant, vacate, and remand" orders in related cases following the issuance of a decision (*see, e.g.*, Stern, *Supreme Court Practice* at 317-20) — the decision in *Culpepper III* should have been promptly applied in *Heimmermann* and *Richardson/Hirsch*. But the panel waited 15 months to issue its decision in *Heimmermann*

and yet another four months after that before ruling in *Richardson/Hirsch*.

3. After the Eleventh Circuit decided *Culpepper III*, but prior to its decision in the other cases argued the same day as *Culpepper III*, the lending industry vigorously lobbied HUD. Among other efforts, the industry provided HUD with a "redlined" version of the 1999 Policy Statement that conspicuously deleted all references to the requirement that yield spread premiums be payments "for" services provided. *See* Pet. App. 112a-154a. Instead, the industry proposed that HUD affirm the interpretation of RESPA that the lender had unsuccessfully pressed on the Eleventh Circuit in *Culpepper III*. *See id.* at 114a-116a, 134a-135a.

On October 18, 2001, without any notice or opportunity for public comment, HUD published the 2001 Policy Statement, which HUD has subsequently admitted was the result of a deal with the industry, under which the industry "would support a HUD rule requiring improved fee disclosure" if HUD issued a "clarification" repudiating *Culpepper III* by adopting the very interpretation of the 1999 Policy Statement that the Eleventh Circuit had rejected in *Culpepper III*.[9] Although it was expressly designed and intended to overrule *Culpepper III*, the 2001 Policy Statement contains no explanation of how the Eleventh Circuit supposedly erred in interpreting RESPA in *Culpepper I* or why the lender's interpretation is in fact consistent with the terms of RESPA § 8(a) and (c). *See* 66 Fed. Reg. at 53054-55. Nonetheless, HUD asserted that, contrary to the Eleventh Circuit's holding in *Culpepper III*, liability under RESPA § 8 in yield spread premium cases must be determined on a loan-by-loan basis, effectively directing courts to deny motions for class certification. *See id.* at 53055.

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[9] *Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process of Obtaining Mortgages To Reduce Settlement Costs to Consumers; Proposed Rule*, 67 Fed. Reg. 49134, 49143 (2002) ("2002 Notice").

In the meantime, the Eighth Circuit decided *Glover v. Standard Federal Bank*, 283 F.3d 953 (8th Cir.), *cert. denied*, 123 S. Ct. 344 (2002), which rejected the idea that HUD's 2001 Policy Statement was entitled to *Chevron* deference but held instead that it was entitled to deference under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), or, in the alternative, consideration under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). A few months later, the Ninth Circuit, over the vigorous dissent of Judge Kleinfeld, held that the 2001 Policy Statement *was* entitled to *Chevron* deference. *See Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 994 (2003). As Judge Kleinfeld noted in his dissent, there was "no avoiding a circuit split" between *Culpepper III*, on the one hand, and *Schuetz* and *Glover*, on the other. *Schuetz*, 292 F.3d at 1014 (Kleinfeld, J., dissenting).

4. On September 18, 2002, 12 days before this Court was to decide whether to grant the petition for a writ of certiorari in *Glover* that would have resolved the conflict between the Eighth and Ninth Circuit decisions rejecting class certification and the Eleventh Circuit decision permitting class certification for RESPA § 8(a) claims, the court below decided *Heimmermann*. Without any explanation for the 15-month delay between *Culpepper III* and its new decision, the *Heimmermann* court held that the 2001 Policy Statement "overrule[d]" its earlier decision in *Culpepper III*, and it reversed the district court's grant of class certification. Pet. App. 11a. The panel believed that, despite the Eleventh Circuit's prior interpretation of RESPA § 8 in *Culpepper I* and *II* and despite its having already rejected as "impossible" the interpretation that HUD subsequently adopted in the 2001 Policy Statement, it was obligated to defer to the 2001 Policy Statement and to overrule *Culpepper III*. *See id.* at 8a (holding that it was "not . . . allow[ed] . . . to reject HUD's interpretation"). The court explained that, because the "plain language" of RESPA does not "speak to the standard for determining whether the payment of a [yield

spread premium] violates the Act," its decision in *Culpepper III* did not "rely squarely upon the plain language of Section 8 of RESPA, but rather upon an *interpretation* of RESPA's language and of the ambiguous 1999 [Policy Statement]." *Id.* at 5a (internal quotations omitted). As a result, the panel concluded in *Heimmermann* that *Culpepper III* left room for HUD to adopt the exact same interpretation that the court had rejected, and that interpretation would be binding upon the court pursuant to the Eleventh Circuit's rule that a court "'must defer to an agency statutory interpretation that is at odds with circuit precedent.'" *Id.* at 9a (quoting *Satellite Broad. & Communications Ass'n of Am. v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994)).

Four months later, again without explaining the reason for the delay, the panel issued an unpublished decision in which it relied on *Heimmermann* and the 2001 Policy Statement to affirm the district court's decision denying class certification in *Richardson/Hirsch*.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S CONCLUSION THAT HUD'S 2001 POLICY STATEMENT COMPELLED IT TO OVERRULE *CULPEPPER III* CONFLICTS WITH THIS COURT'S DECISIONS IN *NEAL*, *LECHMERE*, AND *MAISLIN*

A. This Court's Precedents Hold That Courts Are Not Compelled To Overrule Statutory Interpretation Decisions In Light Of Subsequent Agency Interpretations

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and its progeny, this Court has held that, where Congress has "delegat[ed] . . . specific interpretive authority" to an agency, "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise." *United States v. Mead Corp.*,

533 U.S. 218, 229 (2001). Instead, the court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Id.*

That obligation, however, does not exist when the reviewing court has previously interpreted the statute at issue. Thus, "[b]efore . . . reach[ing] any issue of deference to" the agency, a court "must first determine whether [the agency's interpretation] . . . is consistent with [the court's] past interpretation" of the statute. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992). Where the court previously "determined a statute's clear meaning," the court should "adhere to that determination under the doctrine of *stare decisis*," and an "agency's later interpretation of the statute" is "judge[d] . . . against [the court's] prior determination of the statute's meaning." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

In *Neal v. United States*, 516 U.S. 284 (1996), the Court rejected the argument that, per *Chevron*, it was obligated to defer to a Sentencing Commission interpretation that contradicted the Court's prior interpretation of the LSD mandatory minimum statute in *Chapman v. United States*, 500 U.S. 453 (1991).[10] After *Chapman* was decided, the Sentencing Commission amended the Sentencing Guidelines to establish a dose-based method of calculating the weight of LSD, assigning each dose a presumed weight irrespective of the medium used to distribute the drug. In *Neal*, the petitioner argued that the Sentencing Commission's adoption of this dose-based method required the Court to overrule *Chapman*. *See* 516 U.S. at 239-90. The Court held that, even if the Sentencing Commission's revised Guideline were a permissible interpretation of "mixture or substance" under the LSD mandatory minimum statute — and even though "there

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[10] In *Chapman*, the Court held that "mixture or substance," as used in the mandatory minimum statute, meant that the blotter paper used to distribute LSD must be included in calculating the weight of the LSD in which the defendant trafficked. 500 U.S. at 461-62.

may be little in logic to defend the statute[]" as interpreted in *Chapman* — the Court was not obligated to defer to the Guideline because the "dose-based method cannot be squared with *Chapman*." *Id.* at 294, 295; *see id.* at 290 ("principles of *stare decisis* require that we adhere to our earlier decision").[11]

The Court has explained that the limitation on *Chevron* deference set forth in *Neal*, *Lechmere*, and *Maislin* derives "from institutional concerns about the relationship of the Judiciary to Congress." *Neal*, 516 U.S. at 295. Specifically, the Court "give[s] great weight to *stare decisis* in the area of statutory construction" because "Congress is free to change this Court's interpretation of its legislation." *Id.* (internal quotations omitted). Whereas an agency is free to depart from its past policy judgments, the Court "do[es] not have the same latitude to forsake prior interpretations of a statute." *Id.* Instead, "Congress, not this Court, has the responsibility for revising its statutes." *Id.* at 296.

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[11] *Neal* thus followed the Court's earlier decisions in *Lechmere* and *Maislin*, where the Court similarly refused to overrule a prior decision in light of an agency's new statutory interpretation. In *Lechmere*, the Court found that it was not obligated to defer to the National Labor Relations Board's "latest attempt to implement the rights guaranteed by § 7" of the National Labor Relations Act ("NLRA"), because the Board's interpretation of § 7 conflicted with the Court's interpretation of that provision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). *Lechmere*, 502 U.S. at 535-38. The Court read its decision in *Babcock* to "say[], in *Chevron* terms, that § 7 speaks to the issue of nonemployee access to an employer's property." *Id.* at 537. Similarly, in *Maislin*, the Court rejected the claim that it must defer to the Interstate Commerce Commission's conclusion that a particular practice is unreasonable under 49 U.S.C. § 10701, because the provision "does not specifically address the types of practices that are to be considered unreasonable." 497 U.S. at 130. The Court explained that it had previously interpreted the Interstate Commerce Act to incorporate the filed rate doctrine, and the Commission's interpretation was inconsistent with that doctrine. *See id.* at 130-31.

B. The Eleventh Circuit's Decisions Conflict With *Neal*, *Lechmere*, And *Maislin*

1. The Eleventh Circuit did not follow this Court's instruction that, where a court has previously "determined a statute's meaning," it should "assess an agency's later interpretation of the statute against that settled law" before determining whether any deference is due under *Chevron*. *Neal*, 516 U.S. at 295. The Eleventh Circuit never assessed HUD's 2001 Policy Statement against the court's settled interpretation of RESPA § 8, as set forth in *Culpepper I* and *II*. Instead, the Eleventh Circuit returned to the language of RESPA itself — as though the court were writing on a blank slate — and concluded that the "plain language of RESPA does not prevent us from giving deference to the 2001 [Policy Statement]." Pet. App. 5a.

In reaching that conclusion, the court below brushed aside *Culpepper I* and *II*, in which the Eleventh Circuit had "appl[ied] RESPA as written" in holding that a yield spread premium that is "not tied to the quantity or quality of the services that [the broker] provided" violates RESPA § 8. *Culpepper I*, 132 F.3d at 697; *Culpepper II*, 144 F.3d at 719. The *Heimmermann* court's "explanation" for doing so is simply mumbo jumbo: *Culpepper III* relied upon "an *interpretation* of RESPA's language" and not "upon the plain language of Section 8." Pet. App. 5a.

There is no basis to the court's belief that a legally relevant distinction exists between a statute requiring "interpretation" and one where the meaning is "plain." *Id.* at 5a, 9a. In *Neal*, *Lechmere*, and *Maislin*, the relevant statutory text did not have a clear meaning independent of judicial construction. *See Neal*, 516 U.S. at 289 ("mixture or substance" had "not been defined in the statute or the Sentencing Guidelines and had no distinctive common-law meaning"); *Lechmere*, 502 U.S. at 537 (explaining that earlier precedent had held, "in *Chevron* terms, that § 7 [of the NLRA] speaks to the issue of nonemployee access," despite the fact that § 7 makes no mention of nonemploy-

ees); *Maislin*, 497 U.S. at 130 (finding it irrelevant that statute "does not specifically address the types of practices that are to be considered unreasonable"). Moreover, this Court has squarely held that "[a] rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111-12 (1989).

The *Heimmermann* court also thought it relevant that *Culpepper III* described the 1999 Policy Statement as ambiguous. Pet. App. 5a. But *Culpepper III* did not look to the agency to resolve that ambiguity and instead held that the lender's interpretation of the ambiguous statement was "impossible" to square with the text of both the 1999 Policy Statement and RESPA § 8. 253 F.3d at 1329-30. Thus, when the lender's spurned interpretation reappeared in the 2001 Policy Statement, the court was under no obligation to entertain it at all, let alone to give it *Chevron* deference. It therefore was not compelled to overrule *Culpepper III*.

2. The Eleventh Circuit's view that it had to defer to HUD's effort to "overrule" *Culpepper III* is all the more egregious because the agency was encroaching on the judiciary's role. Courts, not agencies, determine what evidence can establish the commonality needed to certify a class and the scope of a statute's liability provisions in a private right of action.

In *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), this Court made clear that, when a statute creates a private right of action, courts "need not defer to the [agency's] view of the scope of [the statute] because Congress has expressly established the Judiciary and not the [agency] as the adjudicator of private rights of action arising under the statute." *Id.* at 649. As with the statute at issue in *Adams Fruit*, RESPA provides injured borrowers with an express private right of action, 12 U.S.C. § 2607(d)(5), and "[n]o . . . delegation regarding [RESPA's] enforcement

provisions is evident in the statute. Rather, Congress established an enforcement scheme independent of the Executive and provided aggrieved [borrowers] with direct recourse to federal court where their rights under the statute are violated." *Adams Fruit*, 494 U.S. at 650. The Court thus concluded unanimously in *Adams Fruit* that "it would be inappropriate to consult executive interpretations . . . to resolve ambiguities surrounding the scope of [the] judicially enforceable remedy." *Id.*[12]

That was precisely the point made by Judge Easterbrook in his *Krzalic* concurrence when he noted that, because RESPA "is enforced entirely through private litigation, . . . the view of a federal agency achieves binding force only when incorporated into legislative regulations issued under delegated power." 314 F.3d at 882. Judge Easterbrook noted *Heimmermann*'s inexplicable failure to "discuss[] the significance of *Adams Fruit* or *Christensen* [*v. Harris County*, 529 U.S. 576 (2000)] in relation to the agency's disregard of" administrative procedures and observed that "I am confident that *Heimmermann* and *Schuetz* erred in thinking that [the 2001 Policy Statement] is itself conclusive under *Chevron*." *Id.* at 882-83.

Second, under this Court's decisions in *Mead* and *Christensen*, the 2001 Policy Statement is not entitled to *Chevron* deference because it lacks the force of law. *See, e.g.*, *Christensen*, 529 U.S. at 587 ("interpretations contained in policy statements . . . do not warrant *Chevron*-style deference"). The Eleventh Circuit erroneously believed that Congress "expressly delegated" authority to HUD to issue informal interpretations that "carr[y] the full force of law." Pet. App. 6a (citing RESPA § 19(a), 12 U.S.C.

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[12] *See also Califano v. Yamasaki*, 442 U.S. 682, 698-700 (1979) (agency's judgment "that Congress contemplated a case-by-case adjudication of claims . . . th[at] is incompatible with class relief" is inconsistent with the court's duty to apply Rule 23 to "'all suits of a civil nature' under the [Federal] Rules").

§ 2617(a)).[13] The court misconstrued that provision, however, because RESPA "give[s] no indication that Congress meant to delegate authority" to an Assistant Secretary of HUD "to issue [policy statements] with the force of law." *Mead*, 533 U.S. at 231-32.[14] Indeed, the Government has conceded that interpretations issued pursuant to RESPA § 19(a) are "not binding." *United States v. Graham Mortgage Corp.*, 740 F.2d 414, 421-22 (6th Cir. 1984).[15]

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[13] Although RESPA creates a safe harbor for actions taken "in good faith in conformity with any . . . interpretation [of RESPA] by the Secretary" issued under § 19(a), that safe harbor is not implicated here, where respondents' payment of yield spread premiums occurred long before the issuance of the 2001 Policy Statement. 12 U.S.C. § 2617(b); *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567 n.11 (1980) (leaving open question whether safe harbor could be invoked for conduct prior to issuance of agency interpretation). In any event, HUD could not have promulgated a legislative rule that retroactively sanctioned the yield spread premium payments at issue; RESPA contains no "express statutory grant" of "power to promulgate retroactive rules." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988). By deeming the 2001 Policy Statement to have the force of law, however, the *Heimmermann* court treated that statement as if it were a legislative rule. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-21 (D.C. Cir. 2000) ("Only 'legislative rules' have the force and effect of law.") (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 & n.31 (1979)).

[14] In RESPA §§ 8(c)(5) and 19(a), Congress authorized the Secretary of HUD to establish additional exemptions under RESPA § 8(c) — the statutory provision that HUD purportedly was interpreting in the 2001 Policy Statement — but only "in regulations . . . [and] after consultation with the Attorney General" and five other federal agencies. 12 U.S.C. § 2607(c)(5); *see id.* § 2617(a). The fact that Congress required the Secretary to go beyond the normal requirements of notice-and-comment rulemaking to create additional exemptions under § 8(c) strongly suggests that Congress did not intend for HUD's informal interpretations of the existing exemptions in § 8(c) to carry the force of law. In any event, HUD's power to issue interpretations does not necessarily mean that those pronouncements carry the force of law, as this Court made clear in *Mead*. *See* 533 U.S. at 231-32.

[15] Nor would HUD's 2001 Policy Statement warrant special consideration under the factors set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Any claim to expertise is particularly tenuous here, because HUD was opining on an evidentiary matter in the context of

C. The Decisions Below Conflict With Numerous Other Circuits That Refuse To Permit Agencies To Overrule Their Statutory Interpretation Decisions

1. Not only are the Eleventh Circuit's decisions here inconsistent with this Court's decisions in *Neal*, *Lechmere*, and *Maislin*, but they also conflict with decisions of the Second, Fourth, Seventh, Ninth, Tenth, D.C., and Federal Circuits. Those circuits have refused to accord *Chevron* deference to agency interpretations where doing so would require the court to overturn a prior decision interpreting a statute.

The Federal Circuit, for example, has decided a case on virtually identical facts in a manner that directly conflicts with the decision below. *See Bankers Trust New York Corp v. United States*, 225 F.3d 1368 (Fed. Cir. 2000). In that case, a bank argued that it should receive the benefit of a binding judicial precedent on a foreign tax credit question, notwithstanding an IRS regulation that sought to overrule that precedent. The bank argued that "the IRS, as an administrative agency, lacked the power to overrule by regulation a precedent of an appellate tribunal." *Id.* at 1371. Agreeing with the bank, the Federal Circuit explained that, because "the original decision was based on direct judicial construction of the statute, not

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class action claims pursuant to Rule 23 and it has since acknowledged that the 2001 Policy Statement was part of a deal with the mortgage industry. *See* 2002 Notice, 67 Fed. Reg. at 49143. Moreover, HUD has sought to enforce RESPA § 8 on the basis of a lender's standard practices, rather than any loan-by-loan analysis. *See* Complaint, *United States v. Delta Funding Corp.*, No. CV-00-1872 (E.D.N.Y. Mar. 30, 2000), *available at* http://www.ftc.gov/os/2000/03/deltacmp.pdf. And HUD has recently reiterated that, as a matter of its "enforcement priorit[ies]," violators of § 8 should be subject to "penalties as well as individual or class relief." 2002 Notice, 67 Fed. Reg. at 49155. Thus, HUD is asserting a double standard: that it can prove *its* cases — when it can muster the political will to bring them against lenders — through evidence of generally applicable lending practices, but ordinary consumers victimized by those same practices cannot use the class action mechanism to vindicate *their* rights.

deference to the IRS," it was not required to grant *Chevron* deference to the new regulation. *Id.* at 1376. In reaching that decision, the Federal Circuit analyzed this Court's decisions in *Neal* and *Maislin*, as well as numerous cases from various circuits that have "extensively addressed a circuit split involving a similar question." *Id.* at 1375 (citing cases). In language strikingly parallel to the context here, the Federal Circuit noted that "the original interpretation by this court was not based on deference to an agency interpretation." *Id.* at 1374. None of the *Culpepper* decisions rested on "deference to an agency interpretation," but rather based their holdings on class certification and liability on the language of RESPA itself. *Culpepper I*, 132 F.3d at 697; *Culpepper II*, 144 F.3d at 719; *Culpepper III*, 253 F.3d at 1329-30.

Moreover, unlike the Eleventh Circuit below, the Federal Circuit refused to grant *Chevron* deference to the Treasury regulation, even though doing so had "the effect of creating inconsistency with the outcomes in . . . parallel cases" in other circuits. *Bankers Trust*, 225 F.3d at 1376. The court explained that, in exercising its duty "'to say what the law is,'" a court "may not give . . . any executive branch agency the power to overrule an established statutory construction of the court — a power that, with regard to our own prior precedents, even a later panel of this court lacks." *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)). Thus, had the *Heimmermann* court applied the appropriate principles followed by *Bankers Trust*, it would have adhered to *Culpepper III* even if doing so had maintained the circuit conflict with *Schuetz* and *Glover* over whether a class could be certified to challenge a lender's payments of yield spread premiums as violations of RESPA § 8(a). *See Schuetz*, 292 F.3d at 1014, 1016 (Kleinfeld, J., dissenting) (noting that "[t]here's no avoiding a circuit split" and "I agree with [*Culpepper III*]" because "the yield spread premium is

a kickback, and kickbacks are expressly prohibited by [RESPA § 8(a)]"). [16]

Finally, the Federal Circuit expressly rejected the Government's attempt to distinguish *Neal*, *Lechmere*, and *Maislin* with the "bald assertion that '[d]ecisions of the Supreme Court are an exception.'" *Bankers Trust*, 225 F.3d at 1375 (alteration in original). The court held that *Neal*'s "unequivocal . . . assertion that the Court's interpretation of a statutory provision trumps a subsequent agency interpretation that is inconsistent with the Court's precedent" "appl[ies] equally to decisions rendered by circuit courts." *Id.* The court further suggested that the *Neal* rule "should be viewed as even stronger at the court of appeals level, since erroneous interpretations of statutes are correctable not only by Congress, but also by the court itself sitting en banc, as well as by the Supreme Court." *Id.* Yet, in *Culpepper III*, the Eleventh Circuit found no error to correct after the lender filed a rehearing en banc petition, and this Court denied the lender's express request in *Culpepper III* for a grant, vacate, and remand order in light of the 2001 Policy Statement. [17]

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[16] Petitioners do not contend — nor did *Culpepper III* hold (253 F.3d at 1331) — that yield spread premiums are illegal *per se*. A lender's payment of a yield spread premium would be legal if the entirety of the premium were used to offset the closing costs that the borrower otherwise would have owed to the broker, and if it were disclosed as such. In fact, HUD has recently proposed rules that would require yield spread premiums to be paid in exactly, and only, this manner. *See* 2002 Notice, 67 Fed. Reg. at 49147-48. But that was not the case in *Schuetz*, *Glover*, or these consolidated cases.

[17] The rushed nature of the 2001 Policy Statement and the lenders' efforts to influence this Court's proceedings in *Culpepper III* are quite clear in retrospect. On June 15, 2001, the Eleventh Circuit decided *Culpepper III*, at which point the lenders began their lobbying campaign at HUD. The lending industry submitted a redline version of the 1999 Policy Statement with their proposed changes to HUD shortly thereafter. *See* Pet. App. 112a-154a. By filing a rehearing petition, which was denied on August 15, 2001, the lenders did not have to file a petition for a writ of certiorari until mid-November 2001. After HUD issued the 2001 Policy Statement on October 18, 2001 — a remarkably

Like the Federal Circuit in *Bankers Trust*, other circuits have similarly read this Court's decisions to preclude a court from deferring to an agency interpretation that would have the effect of overruling that court's prior interpretation of a statute. Those cases have arisen in a variety of legal contexts. *See Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1051-56 (D.C. Cir. 2000) (refusing to defer where initial court decision was based on "the ordinary, plain-English meaning" of statutory term) (internal quotations omitted); *Industrial Turnaround Corp. v. NLRB*, 115 F.3d 248, 254-55 (4th Cir. 1997) (refusing to defer where initial court decision "unequivocally" interpreted statute and did not "reason that the [agency's earlier] construction of [the statute] was merely a defensible interpretation of the Act subject to change");[18] *Aguirre v. INS*, 79 F.3d 315, 317-18 & n.2 (2d Cir. 1996) (holding that "an agency's interpretation of the statutes it administers . . . cannot compel a court to forgo the principle of *stare decisis* and abandon a construction previously made," but "making an independent decision" to overrule its prior decision, consistent with informal en banc procedures); *EEOC v. Metropolitan Educ. Enters.*,

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short process for this agency — the lender in *Culpepper III* filed its certiorari petition on November 13, 2001, seeking to obtain a GVR in light of the 2001 Policy Statement. *See* Pet. at 13, *Irwin Mortgage Corp. v. Culpepper*, 01-695. After that effort failed, with this Court denying certiorari and refusing to GVR, lenders turned to their alternative strategy of litigating on remand that the informal policy pronouncement was entitled to *Chevron* deference.

[18] *Industrial Turnaround* further highlights the aberrant quality of the decision below in overruling *Culpepper III* without rehearing en banc or this Court's review. Quoting Judge Luttig, the *Industrial Turnaround* court reaffirmed that an agency is "'required to abide by the law of this Circuit in matters arising within the jurisdiction of this court, until and unless it is changed by this court or reversed by the Supreme Court of the United States.'" 115 F.3d at 254 (quoting *United States Dep't of Energy v. FLRA*, 106 F.3d 1158, 1165 (4th Cir. 1997) (Luttig, J., concurring)). As *Industrial Turnaround* notes, the same rule applies to circuit court panel decisions: one panel cannot overrule the decision of another panel. *Id.* at 254-55 (collecting cases). Yet that is precisely what the *Heimmermann* decision below did.

Inc., 60 F.3d 1225, 1229-30 (7th Cir. 1995) (refusing to defer because, "[w]hile we afford deference to legitimate agency interpretations of statutory language made *before* we have ruled on an issue, the converse is not true: the judiciary, not administrative agencies, is the final arbiter of statutory construction") (emphasis added), *rev'd on other grounds sub nom. Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202 (1997); *cf. BPS Guard Servs., Inc. v. NLRB*, 942 F.2d 519, 523 (8th Cir. 1991) (rejecting argument that agency may disregard "the controlling precedent of a superior judicial body").

The one exception to the foregoing rule recognized by different circuits is where the prior decision deferred, at *Chevron* step two, to an agency interpretation that has since been changed.[19] But even that limited exception does not apply here. Thus, in *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (en banc), the Ninth Circuit held that a panel may adopt an agency interpretation where "circuit precedent is to the contrary" "only where the precedent constituted deferential review of [agency]

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[19] Under "step one" of *Chevron*, the court first asks "whether Congress has directly spoken to the precise question at issue," in which case "the court must give effect to the unambiguously expressed intent of Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (internal quotations omitted). In determining whether Congress has spoken to the question at issue, a reviewing court "should not confine itself to examining a particular statutory provision in isolation," but instead must construe "the words of a statute . . . in their context and with a view to their place in the overall statutory scheme." *Id.* at 132-33 (internal quotations omitted); *see also id.* at 133-61 (thoroughly reviewing the relevant provisions before concluding that "Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products"). Only if a reviewing court, after that analysis, concludes that the statute is ambiguous with respect to the question at issue, must it, at "step two" of *Chevron*, "defer to the [agency's] reasonable resolution of that ambiguity." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 484 (2001); *see also id.* at 484-86 (rejecting agency's interpretation of ambiguous statutory provision, where agency "construe[d] the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion").

decisionmaking." *Id.* at 1136; *see also NLRB v. Viola Indus.-Elevator Div., Inc.*, 979 F.2d 1384, 1393-94 (10th Cir. 1992) (en banc) (same). However, where the earlier decision "held either that the [agency] decision was unreasonable or the only possible interpretation of the statute," then the panel must adhere to the precedent. *Mesa Verde*, 861 F.2d at 1136.

The Eleventh Circuit's conclusion that the 2001 Policy Statement compelled it to overrule *Culpepper III* — even though the *Culpepper* decisions reflected the court's independent interpretation of RESPA and the 1999 Policy Statement and were not based on deference to HUD — thus conflicts with every other circuit to have addressed deference in the context of an agency's effort to overrule circuit precedent. But *Heimmermann* was not an aberration. Rather, in an earlier case on which *Heimmermann* relied, the Eleventh Circuit had similarly concluded that it was bound to overrule a statutory interpretation decision in light of a subsequently issued agency interpretation. *See Satellite Broad.*, 17 F.3d at 348. As in *Heimmermann*, the court there erroneously found it relevant that its initial decision was based "not upon the statute's 'clear meaning,' but rather upon inferences drawn from the statutory scheme and upon our policy determination." *Id.* Indeed, the Eleventh Circuit has firmly adopted a general rule, contrary to the rule in most other circuits and this Court's guidance in *Neal*, *Lechmere*, and *Maislin*, that courts "must defer to an agency statutory interpretation that is at odds with circuit precedent." *Id.* at 347; *see* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833, 852 & n.96 (2001) (citing *Satellite Broadcasting* as evidence of circuit split between Eleventh Circuit and other circuits). There is therefore no question that if *Heimmermann* and *Richardson/Hirsch* had arisen in a similar posture in other circuits — with binding precedent such as *Culpepper III* upholding class certification — those courts would have rejected HUD's brazen effort to overrule circuit precedent with an informal policy pronouncement.

2. Indeed, the Seventh Circuit has now rejected the very argument accepted by the Eleventh Circuit with respect to the same 2001 Policy Statement. *See Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002).[20] In its 2001 Policy Statement, HUD sought to overrule not only *Culpepper III*'s conclusion that a class could be certified to challenge a lender's payment of yield spread premiums under RESPA § 8(a), but also the Seventh Circuit's interpretation of RESPA § 8(b)[21] in *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001), which held that a plaintiff must prove that the defendant split a fee with a third party to establish a RESPA § 8(b) violation. *Id.* at 627. *See* 2001 Policy Statement, 66 Fed. Reg. at 53058. The *Echevarria* court had refused to defer to informal HUD opinion letters concluding that no third party was required for a violation of § 8(b), stating that, "[a]bsent a formal commitment by HUD to an opposing position, we decline to overrule our established RESPA § 8(b) case law." 256 F.3d at 628-30 (citing *Christensen*, 529 U.S. at 587).

HUD thought it could make that "formal commitment" by issuing the 2001 Policy Statement and publishing it in the *Federal Register* even without notice-and-comment rulemaking. *See* 66 Fed. Reg. at 53053. The Seventh Circuit, however, refused to overrule *Echevarria* based on the 2001 Policy Statement. *See Krzalic*, 314 F.3d at 881.[22] The Seventh Circuit found that HUD had failed to explain

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[20] We have been advised by counsel for the borrowers in the *Krzalic* case that they intend to file a petition for a writ of certiorari.

[21] RESPA § 8(b) provides: "No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. § 2607(b).

[22] *See also Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 265-68 (4th Cir. 2002) (refusing to defer to HUD interpretation of RESPA § 8(b) in 2001 Policy Statement); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 838-40 (8th Cir. 2003) (same).

why the text of § 8(b), "when read in the context of the statute as a whole or of the commercial or other real-world (as opposed to law-world or word-world) activity that the statute is regulating, points to an unreasonable result." *Krzalic*, 314 F.3d at 879-80. The Seventh Circuit also criticized HUD for setting forth its interpretation in nothing "more formal, more deliberative, than a simple announcement" that "expresses disagreement with our decision in *Echevarria* but gives no reason except that HUD has always regarded such fees as forbidden by the statute." *Id.* at 881.[23]

The contrast between the two circuits' treatment of the 2001 Policy Statement, therefore, could not be starker. In June and July 2001, the Eleventh and Seventh Circuits issued *Culpepper III* and *Echevarria*, respectively, interpreting provisions of RESPA § 8. Just months later, without any notice or opportunity to comment, "the [2001] policy statement simply appeared in the Federal Register," purporting to overrule both decisions. *Krzalic*, 314 F.3d at 881. As Judge Easterbrook explained, by refusing to set forth its contrary interpretations in "legislative regulations issued under delegated power," HUD simply "issued a broadside and hoped that courts would kowtow." *Id.* at 882 (Easterbrook, J., concurring in part and concurring in the judgment). The Eleventh Circuit, adhering to *Satellite Broadcasting*, caved in; the Seventh Circuit refused.

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[23] Although Judge Posner suggested, in *dicta*, that HUD's discussion of § 8(a) in the 2001 Policy Statement was more than perfunctory, *see Krzalic*, 314 F.3d at 881, in fact one searches in vain to find any analysis by HUD in the 2001 Policy Statement of how the Eleventh Circuit erred in interpreting RESPA § 8(a) and (c) in *Culpepper I* or why HUD's interpretation of the 1999 Policy Statement is consistent with the terms of those provisions. *See* 66 Fed. Reg. at 53054-55; *see also Krzalic*, 314 F.3d at 882-83 (Easterbrook, J., concurring in part and concurring in the judgment) (expressing "confiden[ce] that *Heimmermann* . . . erred in thinking that the [2001 Policy Statement] is itself conclusive under *Chevron*").

II. THIS CASE RAISES AN IMPORTANT AND RECURRING PROBLEM OF ADMINISTRATIVE LAW IN A CONTEXT OF GREAT PRACTICAL SIGNIFICANCE FOR CONSUMERS

A. This Conflict Shows No Sign Of Abating Across A Vast Array Of Regulatory Regimes

Since this Court's decision in *Neal*, the courts of appeals have had numerous opportunities to apply the proper administrative law principles in determining whether agency action that expresses disagreement with prior judicial decisions is entitled to *Chevron* deference across a wide spectrum of administrative agencies. In deciding whether to permit an agency to overrule circuit precedent, courts of appeals have routinely applied bedrock administrative law decisions involving different agencies, such as *Neal*, *Lechmere*, and *Maislin*, without limiting their analysis simply to cases involving the agency at issue. *See, e.g., Krzalic*, 314 F.3d at 878-81; *Bankers Trust*, 225 F.3d at 1372-73; *Association of Battery Recyclers*, 208 F.3d at 1051; *Aguirre*, 79 F.3d at 317; *Metropolitan Educ. Enters.*, 60 F.3d at 1229.

The conflict among the circuits is thus deep, mature, and recurring. All but three circuits have weighed in on the issue. Indeed, even the Eleventh Circuit itself in *Satellite Broadcasting* purported to be following generally applicable administrative law decisions. *See* 17 F.3d at 348. It simply misunderstood this Court's precedents. With the decision below expressly relying on *Satellite Broadcasting*, there is no likelihood that, absent this Court's intervention and guidance, the Eleventh Circuit will abandon its view that a court must overrule one of its precedents whenever an agency issues a contrary interpretation. The circuit conflict now deepened by the Eleventh Circuit's decision has also attracted the notice of distinguished academic commentators. *See* Merrill & Hickman, 89 Geo. L.J. at 852 & n.96.

B. The Issue Is Of Surpassing Importance For The Proper Allocation Of Power Between The Executive And Judicial Branches

As *Chevron* itself noted, the question of when a court must defer to an administrative agency involves "reconcil[ing] competing political interests." 467 U.S. at 865. In the *Neal* trilogy, this Court made clear the circumstances when this Court's prior construction of a statute must be followed by an agency and when an agency may use its delegated authority to change an interpretation that must then be respected by this Court. *See* pp. 13-15, *supra*. That question raises one of the most fundamental issues involving the allocation of power between the executive and judicial branches. As Justice Scalia noted in his *Mead* dissent, "I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency — or have allowed a lower court to render an interpretation of a statute subject to correction by an agency." 533 U.S. at 248-49.

Since *Neal*, federal agencies and circuit courts of appeals alike have struggled with how to apply this Court's teachings to the interplay between agency pronouncements and court of appeals decisions. This Court appears not to have spoken on when a *circuit* must adhere to its own precedent and when it must give way to an agency's contrary view. Yet the circuit court level is where the vast majority of decisions affecting agency actions are made and where disagreements among the courts of appeals pose special difficulties not present when this Court's construction of a statute offers final and authoritative guidance. Litigants and agencies alike need to know what reliance interests will be protected if even direct judicial constructions of statutes are subject to bureaucratic caprice, and every utterance by an agency, no matter how informal, insignificant, or hurried, is accorded deference under *Chevron*. For litigants that have the capacity to challenge agency actions in different circuits, the

circuit conflict invites forum shopping. In light of the wide array of regulatory regimes already implicated in this conflict, the specter is real that citizens in one circuit will receive federal rights and benefits that those similarly situated in another circuit will not.

Furthermore, letting the decisions below stand will not only frustrate the clear intent of Congress to use RESPA to prevent kickbacks between lenders and brokers; it will also cause a perversely different outcome to the parties on arbitrary grounds. The Eleventh Circuit heard argument in *Culpepper III on the same day* as petitioners' cases. By inexplicably sitting on these cases for more than a year, and then allowing HUD to overrule *Culpepper III* in the cases below, the Eleventh Circuit effectively denies similarly situated litigants all the hard-fought benefits won in *Culpepper III* and treats that case like a trial balloon that can rise or fall at the agency's whim.

Finally, if permitted to stand, the Eleventh Circuit's holdings will only further embolden HUD and other agencies to challenge every judicial construction with which they disagree in the Eleventh Circuit and beyond in the hope that courts will simply "kowtow." *Cf. Krzalic*, 314 F.3d at 882-83 (Easterbrook, J., concurring in part and concurring in the judgment). As the Eighth Circuit observed, "*Chevron* does not stand for the proposition that administrative agencies may reject, with impunity, the controlling precedent of a superior judicial body." *BPS Guard Servs.*, 942 F.2d at 523-24. Yet the naked implication of *Heimmermann* is that they may do so; indeed, to overturn any Eleventh Circuit decision, an agency need only issue the most informal and fatuous assertions of "policy." The notion that an Assistant Secretary of an agency has the power to issue an informal policy statement that will overrule a federal court of appeals' decision and will dictate how courts determine evidentiary and liability standards in private rights of action created by statute is truly offensive to our system of separated powers. *See* 66 Fed. Reg. at 53052; 64 Fed. Reg. at 10080.

In shaping the boundaries between an agency's delegated authority and the judiciary's responsibility to say what the law requires, this Court's decisions from *Chevron* to *Mead* and beyond have never authorized agencies to flout court of appeals decisions by announcing an intent to overrule them and having those policy pronouncements be given controlling deference even when made without the requisites of formality that this Court set forth in *Mead*. This case presents an ideal vehicle for the Court to set straight an Eleventh Circuit that has stretched the bounds of judicial legitimacy in these cases beyond all recognition and to rein in an administrative agency that has responded to political pressure by interfering with the courts' duty to define when ordinary citizens victimized by egregious lending practices may band together to obtain the remedy Congress sought to provide them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 26, 2003

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14066

DANIEL HEIMMERMANN, INDIVIDUALLY AND
ON BEHALF OF THEMSELVES AND A CLASS DESCRIBED,
EMILY HEIMMERMANN, INDIVIDUALLY AND
ON BEHALF OF THEMSELVES AND A CLASS DESCRIBED,
Plaintiffs-Appellees,

v.

FIRST UNION MORTGAGE CORPORATION,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama

[Filed September 18, 2002]

Before EDMONDSON, Chief Judge, and COX and GIBSON*, Circuit Judges.

EDMONDSON, Chief Judge:

First Union Mortgage Corporation appeals the district court's grant of class certification to a class of plaintiffs seeking damages for First Union's alleged violation of Section 8 of the Real Estate Settlement Procedures Act (RESPA). *See* 12 U.S.C. § 2601, et. seq. We accepted jurisdiction over this appeal. *See* Fed.R.Civ.P. 23(f). We review a district court's certification of a class for abuse of

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* Honorable John R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

discretion. *See Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1359 (11th Cir.2002). For a district court to apply the wrong legal standard is an abuse of discretion. *See id.* We vacate the grant of class certification.

BACKGROUND

This case is one of several dealing with RESPA's effect on the legality of the payment of Yield Spread Premiums (YSP) by mortgage lenders to mortgage brokers. For a detailed discussion of YSP's and their role in the real estate mortgage market, *see Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692, 694 (11th Cir.1998) (*Culpepper I*) and *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324, 1326 (11th Cir.2001) (*Culpepper III*).[1] A YSP is a payment made by a lender to a broker in exchange for that broker's delivering a mortgage that is above the "par rate" being offered by the lender. Briefly stated, the payment is typically a certain percentage of the total amount of the loan; the exact percentage is determined by the extent to which the actual interest rate exceeds the par rate. These YSP's potentially violate Section 8(a) of RESPA, which prohibits the payment of kickback fees and referrals in association with mortgage lending.

In *Culpepper III* – argued the same day as this case – we concluded that class certification in a case alleging a violation of RESPA was appropriate where the payment of a YSP was based solely upon the amount by which the loan rate exceeded the par rate and where the payment of the YSP was not tied to specific services provided by the broker. Because whether this standard was satisfied could be determined on a class-wide basis, we concluded that the district court in *Culpepper III* did not err by granting class certification. *See Culpepper III*, 253 F.3d at 1332.

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[1] *See also Culpepper v. Inland Mortgage Corp.*, 144 F.3d 717 (11th Cir.1998) (*Culpepper II*) (denying motion for rehearing in *Culpepper I*).

Shortly after our *Culpepper III* ruling, the Department of Housing and Urban Development issued a Statement of Policy (the 2001 SOP),[2] purportedly clarifying a Statement of Policy issued in 1999 (the 1999 SOP).[3] Our ruling in *Culpepper III* had relied heavily on the 1999 SOP. According to First Union, the 2001 SOP is at odds with the outcome of *Culpepper III* and compels a different result in this case.

DISCUSSION

Before we address the substance of the 2001 SOP, we must determine its applicability to this case. Although the 2001 SOP raises some concerns about the retroactive application of agency interpretations, about the deference given to policy statements, and about the ability of an agency interpretation to overrule prior circuit precedent, we ultimately conclude that nothing prevents the application of the 2001 SOP to this case.

I. Retroactive Application of the 2001 SOP

The 2001 SOP was promulgated after the transactions that gave rise to this litigation and after the district court's ruling on the issue of class certification. But because we accept that both the 2001 SOP and the statement it interprets, the 1999 SOP, are clarifications of existing law[4] and not new rules or regulations, no problem

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[2] Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed.Reg. 53,052 (Oct. 18, 2001).

[3] Real Estate Settlement Procedures Act Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed.Reg. 10,080, 10,080 (March 1, 1999).

[4] The 2001 SOP states that it was "issued to *eliminate any ambiguity* concerning the Department's position with respect to . . . yield spread premiums," and that, "in issuing this Statement of Policy, the Department *clarifies* its interpretation of [RESPA] in [the 1999 SOP]." 66 Fed.Reg. at 53,052 (emphasis added). Likewise, the 1999 SOP states that it was issued pursuant to Congress's direction that HUD

with the retroactive application of the statements exists. *See Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir.1999) ("[C]oncerns about retroactive application are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law"); *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir.1993), *overruled on other grounds, Johnson v. Apfel*, 189 F.3d 561 (7th Cir.1999) ("A rule simply clarifying an unsettled or confusing area of the law . . . does not change the law, but restates what the law according to the agency is and has always been: 'It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.' ") (quoting *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936)); *see also Farmers Telephone Co. v. FCC*, 184 F.3d 1241, 1250 (10th Cir.1999); *Orr v. Hawk*, 156 F.3d 651, 654 (6th Cir.1998); *Cowen v. Bank United of Texas*, 70 F.3d 937, 943 (7th Cir.1995).

While not dispositive, an agency's determination that a new statement is a clarification of existing law, rather than an entirely new rule, is generally given much weight. *See Pope*, 998 F.2d at 483. We will defer to an agency's statement that a new rule is a clarification of the law, instead of a new rule altogether, unless "the prior interpretation . . . is patently inconsistent with the later one." *Id.* Another significant indicator that a statement only clarifies existing law is when the law supposedly being clarified is ambiguous. *See Piamba Cortes*, 177 F.3d at 1283-84.

We accept that the 2001 SOP created no new rule, but instead only clarified the interpretation of RESPA found in the 1999 SOP. The 2001 SOP itself states that it is merely clarifying the 1999 SOP; and nowhere in the 2001 SOP does HUD claim to be changing the law. And, we do

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"*clarify* its position on lender payments to mortgage brokers. . . ." 1999 SOP, 64 Fed.Reg. at 10,080 (emphasis added).

not consider the 2001 SOP to be "patently inconsistent" with RESPA or with the 1999 SOP. In *Culpepper III* we wrote that the 1999 SOP was "ambiguous" and subject to different interpretations. *Culpepper III*, 253 F.3d at 1327. Based upon these considerations, we conclude that the 2001 SOP is a clarification of existing law and that no retroactivity problems prevent its application to this case.

II. *Chevron* Deference

An additional preliminary question is what deference, if any, should be given to the 2001 SOP.

No deference is to be given to an agency interpretation that is at odds with the plain meaning of the statute being interpreted. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). But RESPA does not, by its plain language, speak to the standard for determining whether the payment of a YSP violates the Act. Section 8(a) of RESPA simply prohibits kickbacks and referral fees, *see* 12 U.S.C. § 2607; Section 8(c) allows payment "for services actually performed in the making of a loan." The question of how to determine when a YSP is an illegal kickback and when it is a legally permissible payment for services actually performed is not specifically addressed in RESPA. Our ruling in *Culpepper III* did not purport to rely squarely upon the plain language of Section 8 of RESPA, but rather upon an *interpretation* of RESPA's language and of the "ambiguous" 1999 SOP. *See Culpepper III*, 253 F.3d at 1329-1330. The plain language of RESPA does not prevent us from giving deference to the 2001 SOP.[5]

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[5] The Eighth and Ninth Circuits have both concluded that the 2001 SOP is not inconsistent with the plain language of RESPA. *See Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1012 (9th Cir.2002) ("We must first determine whether the language of [Section] 8(c)(2) unambiguously forbids HUD's interpretation. It does not.") (internal marks and citations omitted); *Glover v. Standard Federal Bank*, 283 F.3d 953, 963-965 (8th Cir.2002) ("HUD's two-part test [from the 2001 SOP] is fully consistent with RESPA.").

A question also exists about whether the 2001 SOP is the kind of agency statement to which the courts should give broad deference. In *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001), the Supreme Court wrote that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 2171. RESPA contains an express delegation of congressional authority: the statute authorizes the Secretary of HUD "to prescribe such rules and regulations, *to make such interpretations*, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this chapter." 12 U.S.C. § 2617(a) (emphasis added). HUD regulations identify a "statement of policy" as a document that embodies such a "rule, regulation, or interpretation" under RESPA's delegation of authority. *See* 24 C.F.R. § 3500.4(a)(1)(ii).[6]

Because the power to issue interpretations is expressly delegated in RESPA, the 2001 SOP carries the full force of law. As a result, we give deference to the 2001 SOP. The precedents are not to the contrary. In *Mead* and *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), the Supreme Court concluded that certain kinds of agency pronouncements were not due broad *Chevron* deference. *See United States v. Mead Corp.*, 121 S.Ct. at 2173-74 (concluding that Customs Service ruling letter was not entitled to *Chevron* deference); *Christensen*, 120 S.Ct. at 1662-63 (concluding that Department of Labor opinion letter was not entitled to *Chevron* deference). But, neither of the agency interpretations at issue in *Mead* and *Christensen* involved an agency acting pursuant to a statutory delegation of interpretive

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[6] In *Culpepper III*, we wrote that 24 C.F.R. § 3500.4(a)(1)(ii) imbues HUD Statements of Policy interpreting RESPA with "the force of a regulation." *See Culpepper III*, 253 F.3d at 1327.

power. In this case, on the other hand, a congressional delegation of authority giving HUD's Statement of Policy the force of law does exist. And, the interpretation we are reviewing – the 2001 SOP – was promulgated pursuant to that delegation of authority.

Given the express delegation of authority in RESPA, formal notice-and-comment is not needed to extend deference to the 2001 SOP. *See Barnhart v. Walton*, 535 U.S. 212, 122 S.Ct. 1265, 1271-72, 152 L.Ed.2d 330 (2002) (stating that *Chevron* deference can still apply even in the absence of a notice and comment period); *Mead*, 121 S.Ct. at 2173 ("[T]he want of [notice and comment] here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.") (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995)).

We also reject the argument that the 2001 SOP is due no deference because it is inconsistent with earlier expressions of HUD's position. We cannot say that the 2001 SOP is "inconsistent" with the 1999 SOP. The 1999 SOP was "ambiguous." The 2001 SOP clarifies that ambiguity. Plaintiff also points to letters from HUD's general counsel to members of Congress and points to a lawsuit filed by the United States; Plaintiff says these things show that HUD's position, before the 2001 SOP, was consistent with the way we interpreted the 1999 SOP in *Culpepper III*. We reject this argument for several reasons. First, we are unconvinced that the letters and pleadings Plaintiff identifies are inconsistent with the 2001 SOP. At best, they reflect the ambiguity we saw in the 1999 SOP. Second, the kinds of documents identified by Plaintiff – informal letters written by agency lawyers and positions taken in litigation – are the kinds of informal policy positions that lack the force of law and are unentitled to *Chevron* deference. *See Mead*, 121 S.Ct. at 2175; *Christensen*, 120 S.Ct. at 1662. Even if the 2001 SOP is inconsistent with these informal indications of policy, we cannot say that the official position of HUD on the present issue has been incon-

sistent. We conclude, therefore, that the 2001 SOP is within the realm of agency interpretations that carry the force of law and are due broad deference.

We also reject the argument that the 2001 SOP is inconsistent with clear congressional intent and, therefore, is due no *Chevron* deference. *See Chevron*, 104 S.Ct. at 2782. We cannot say that HUD's interpretation violates Congress's clear intent in enacting RESPA. *See, e.g., Bjustrom v. Trust One Mortgage Corp.*, 178 F.Supp.2d 1183, 1196 (W.D.Wash.2001); *Levine v. North American Mort.*, 188 F.R.D. 320, 328-29 (D.Minn.1999). One of RESPA's stated goals is "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2). The test laid out in the 2001 SOP, which does ban fees in excess of what would be reasonable compensation for the broker's service, seems to fulfill that ultimate goal. In addition, nothing in the language of RESPA itself compels the conclusion that HUD's test for the legality of YSP's – admittedly more lenient than that adopted in *Culpepper III* – violates congressional intent.

That we may have determined in *Culpepper III* that a different interpretation of RESPA (in our view) is better or more consistent with the statutory language does not require – or even allow – us to reject HUD's interpretation. "[T]he resolution of ambiguity in a statutory text is often more a question of policy than of law." *Florida Manuf. Housing Ass'n, Inc. v. Cisneros*, 53 F.3d 1565, 1572 (11th Cir.1995) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 111 S.Ct. 2524, 2534, 115 L.Ed.2d 604 (1991)); *see also Gonzalez v. Reno*, 212 F.3d 1338, 1349 (11th Cir.2000) ("[T]he courts cannot properly reexamine the wisdom of an agency-promulgated policy."). That we may prefer a different interpretation is not enough to deny deference to the agency interpretation. *See Florida Housing*, 53 F.3d at 1572 ("[T]he court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question ini-

tially had arisen in a judicial proceeding.") (quoting *Chevron*, 104 S.Ct. at 2782 n. 11). We conclude, therefore, that the 2001 SOP is entitled to *Chevron* deference.[7]

III. Effect of 2001 SOP On *Culpepper III*

We also conclude that the rule announced in the 2001 SOP can, in effect, overrule the holding of *Culpepper III*. "Courts generally must defer to an agency statutory interpretation that is at odds with circuit precedent, so long as the agency's answer is based on a permissible construction of the statute." *Satellite Broadcasting and Communications Ass'n of America v. Oman*, 17 F.3d 344, 347 (11th Cir.1994) (internal quotations omitted); *cf. Lechmere v. NLRB*, 502 U.S. 527, 112 S.Ct. 841, 847-48, 117 L.Ed.2d 79 (1992) ("Once we have determined a statute's *clear meaning*, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.") (emphasis added) (quoting *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 2768, 111 L.Ed.2d 94 (1990)).

IV. Application of the 2001 SOP

We conclude that the substance of the 2001 SOP compels a different result in this case than the result in *Culpepper III*. The 2001 SOP explicitly rejects the foundation of *Culpepper III* : "neither Section 8(a) of RESPA nor the 1999 [SOP] supports the conclusion that a yield spread premium can be presumed to be a referral fee

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[7] The Ninth Circuit has also concluded that the 2001 SOP is due *Chevron* deference. *See Schuetz*, 292 F.3d at 1012 ("*Chevron* deference is due even though HUD's Policy Statements are not the result of formal rulemaking or adjudication.").

And, because we conclude that the 2001 SOP is entitled to deference as an interpretation of RESPA, we need not consider whether the 2001 SOP would also be entitled to deference as an interpretation of HUD's own ambiguous regulations, 24 C.F.R. § 3500.14, under the rule of *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). We also need not consider whether the 2001 SOP would be entitled to deference based upon its power to persuade. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

based solely upon the fact that the lender pays the broker a yield spread premium that is based upon a rate sheet, or because the lender does not have specific knowledge of what services the broker has performed." 2001 SOP, 66 Fed.Reg. at 53,055.

According to the 2001 SOP, the first step in assessing whether RESPA has been violated is to determine whether the broker has provided goods or services of the kind typically associated with a mortgage transaction.[8] Contrary to the conclusion in *Culpepper III*, the lender and the broker need not be able to tie the YSP payment to specific services provided. If this first step is satisfied, the fact-finder must proceed to the second step: determining whether the total compensation paid to the broker is reasonably related to the total value of the goods or services actually provided. *See* 2001 SOP, 66 Fed.Reg. at 53,055.

Based on the 2001 SOP, we conclude that the district court did abuse its discretion in granting class certification in this case. Federal Rule of Civil Procedure 23(a) identifies four requirements which must be satisfied before a class can be certified. These elements are the requirements: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a).

In this case, the district court concluded that the requirements were met. The district court determined that common questions of fact were dominant because the class representative alleged these things: 1) for each class member's loan, the amount of the YSP was based solely

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[8] The kinds of services that would satisfy the first element of the test are laid out in the 1999 SOP. *See* 64 F.R. at 10,085. The first element of the test does have some substance: a payment to a broker who provides "no, nominal, or duplicative work" would violate RESPA.

upon the amount by which the loan rate exceeded the par rate; and 2) for each class member's loan, the YSP was not tied directly to specific additional services provided by the broker.

The 2001 SOP, however, makes clear that facts such as those alleged are not sufficient to establish a violation of RESPA. Instead, it is necessary to determine whether compensable services were provided by the broker and whether the total amount of broker compensation was reasonable in the light of the circumstances of each loan. In granting class certification, the district court therefore applied what we now see as an improper legal standard. *See Piamba Cortes*, 177 F.3d at 1282-83 (appellate court reversing district court by applying a clarifying protocol – which carried the force of law – to Warsaw Convention even though the protocol was ratified by Senate only after the district court rendered its decision). The district court therefore abused its discretion when it granted class certification.

In sum, we conclude that the 2001 SOP may be retroactively applied to this case, that the SOP is entitled to deference, and that the SOP's interpretation of RESPA is contrary to and, in effect, overrules *Culpepper III*. Because the 2001 SOP demonstrates that the district court applied the wrong legal standard, the district court abused its discretion in granting class certification. Therefore, the district court's grant of class certification is hereby vacated, and we remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11554

BETH A. RICHARDSON,
Plaintiff-Appellant,

v.

BANKAMERICA CORPORATION, A DELAWARE CORPORATION, BANK OF AMERICA FSB, INC., A HAWAII CORPORATION, INCORPORATED UNDER THE LAWS OF THE UNITED STATES OF AMERICA, D.B.A BANKAMERICA MORTGAGE,
Defendants-Appellees.

PAMELA C. HIRSCH, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, DAVID L. HIRSCH,
Plaintiffs-Appellants,

v.

BANKAMERICA CORPORATION, A DELAWARE CORPORATION, BANK OF AMERICA FSB, INC., A HAWAII CORPORATION, BANKAMERICA MORTGAGE, A DIVISION OF BANKAMERICA FSB, A HAWAII CORPORATION,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia
(Docket Nos. 98-01031-CV-1-ODE, 98-1032-CV-1-OD)

[Filed January 24, 2003]

Before EDMONDSON, Chief Judge, COX and GIBSON*, Circuit Judges.

PER CURIAM:

Beth A. Richardson appeals the district court's denial of class certification to a class of plaintiffs seeking damages for BankAmerica's alleged violation of Section 8 of the Real Estate Settlement Procedures Act (RESPA). *See* 12 U.S.C. § 2601, et seq. This case is one of several dealing with the legality of the payment of Yield Spread Premiums (YSP) by mortgage lenders to mortgage brokers.

In *Heimmermann v. First Union Mtg. Corp.*, 305 F.3d 1257 (11th Cir. 2002), we said that the Department of Housing and Urban Development's 2001 Statement of Policy (SOP) applied retroactively and required vacating a grant of class certification. Under the 2001 SOP and *Heimmermann*, the district court did not abuse its discretion by denying class certification.

AFFIRMED.

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* Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
(Northwestern Division)

No. CV-98-J-2357-NW

DANIEL AND EMILY HEIMMERMANN, ET AL.,
Plaintiff,

v.

FIRST UNION MORTGAGE CORPORATION,
Defendant.

[August 13, 1999]

MEMORANDUM OPINION AND ORDER

JOHNSON, District Judge.

This cause comes before this court on plaintiffs' Motion for Class Certification (doc. 13) and Amended Motion for Class Certification (doc. 19). The court has considered the memoranda of law filed in support of and against the motion for class certification, the parties' evidentiary submissions and the oral arguments of the parties at the hearing held on this motion.

Factual Background

Plaintiffs' request certification under Federal Rule of Civil Procedure 23(b)(3) for a class defined as:

> All persons residing in the United States and its territories who, during the period one year prior to the date of the filing of this Complaint forward, obtained a federally-related mortgage loan from the defendant in which the borrower(s) HUD-1 reflects: (1) that the mortgage broker was paid a fee for its services from

> the "Borrowers' Funds" and/or the "Seller's Funds" at closing and (2) that First Union Mortgage Corporation paid the mortgage broker a fee outside of closing ("POC").

(doc. 19). The basis for plaintiffs' complaint against the defendant is that the defendant paid a "yield spread premium" to the mortgage broker Tennessee Valley Funding in violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607. Section 2607(a) of RESPA mandates:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

According to plaintiff the "yield spread premiums" paid by the defendant to various mortgage brokers is a referral fee that violates this statute. (doc. 1). Plaintiffs claim these fees are illegal because they are not based on any services or goods provided by the broker. To evidence this plaintiff points to the calculation method for determining these fees. Defendant would establish a "par rate", the rate at which defendant would offer loans, if the broker could then obtain the loan at a higher rate than par, the broker would receive the excess. This excess is what has been referred to as a "yield spread premium".

Rule 23, Federal Rules of Civil Procedure

When ruling on a class certification "[t]he decision to certify is within the broad discretion of the court, but that discretion must be exercised within the framework of Rule 23." *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir.1996); citing *General Telephone Co. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982). Courts must remain within this framework when deciding issues of class certification and can not venture outside the realm of Rule 23 to consider the merits of the underlying action. *Eisen v. Carlisle & Jacquelin*, 417 U.S.

156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) ("in determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met"); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir.1987); *see also Coon v. Georgia Pacific Corp.*, 829 F.2d 1563, 1566 (11th Cir.1987).

The foundation for any Rule 23 framework lies in Rule 23(a), Fed.R.Civ.P. The requirements of Rule 23(a) are recognized as: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613, 117 S.Ct. 2231, 2245, 138 L.Ed.2d 689 (1997). The defendant concedes the numerosity requirement of Rule 23(a)(1). Defendant's memorandum in opposition to plaintiff's motion for class certification at 20. The defendant contends that the proposed class can not meet the commonality, typicality, and adequacy of representation requirements.

The commonality, typicality, and adequacy of representation requirements are very similar and analysis of these three "tend to merge." *Washington v. Brown & Williamson Tobacco Corporation*, 959 F.2d 1566, 1569 n. 8 (11th Cir.1992); citing *General Telephone Co.*, 457 U.S. at 157, n. 13, 102 S.Ct. at 2364, n. 13, 72 L.Ed.2d 740 (1982). Commonality stems from Rule 23(a)(2) which allows class certification if "there are questions of law or fact common to the class". The rule does not require that all questions raised by the litigation be common. *Cox v. American Cast Iron Pipe Company*, 784 F.2d 1546, 1557 (11th Cir.1986). To satisfy the commonality requirement "[t]he claims actually litigated in the suit must simply be those fairly represented by the named plaintiffs." *Cox*, 784 F.2d at 1557.

Typicality is very similar to commonality: ""Typicality' exists when 'a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff.'" *Andrews v. American Telephone*

& Telegraph Co., 95 F.3d 1014, 1022 (11th Cir.1996) *quoting In re American Medical Systems, Inc.*, 75 F.3d 1069, 1082 (6th Cir.1996).

Legal Analysis

The defendant argues that these requirements can not be met in this situation because "yield spread premiums" are not per se illegal. *Culpepper v. Inland Mortgage Corp.*, 144 F.3d 717 (11th Cir.1998). While 12 U.S.C. § 2607(a) disallows referral fees, 12 U.S.C. § 2607(c) does allow payments for "bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." Defendant contends that the court would have to address each individual loan to determine if the payment was for service compensation and if such payment was reasonable.

Much of defendant's argument against certification of the proposed class stems from the recent RESPA policy statement issued by the Department of Housing and Urban Development (HUD). 64 Fed.Reg. 10080. Defendant argues that each loan must receive individual evaluation because the policy statement instructs that "[a]ll payments, including payments based upon a percentage of the loan amount, are subject to the reasonableness test defined above." 64 Fed.Reg. at 10084. HUD bases this "reasonableness test" on a number of factors that, according to defendant, erode all typicality and commonality. Defendant interprets the statement to require the reasonableness test regardless of how the "yield spread premium" is generated or calculated.

This reasoning does not comport with the controlling law of this Circuit, which requires that payments relate to the services provided by the broker. *See Culpepper*, 144 F.3d at 718 ("The only issue decided by the court was whether as a matter of law Inland had proven in the instant record that this yield spread premium . . . was a payment for goods or services and therefore not a prohibited referral fee"). Furthermore, the defendant's interpretation is logically inconsistent with RESPA itself. Under

this analysis a mortgage company can provide "yield spread premiums" based solely on the difference between the par rate and the rate obtained and then when challenged, simply argue the referral fee was reasonable compensation in light of the actual service provided.

The logical conclusion of this interpretation would actually legalize some referral fees and kickbacks. For example some referral fees would constitute reasonable compensation because the mortgage company might fortuitously have had additional processing steps for that particular loan. Other referral fees would remain illegal because they were easily prepared and processed, rendering the additional fee unreasonable compensation. The ultimate result of this system would render the referral fee prohibition moot. Courts could no longer consider the nature of the fee, only the totality of the "compensation".[1] This is clearly at odds with the statutory language of 12 U.S.C. § 2607(a).

This interpretation is also inconsistent with the actual HUD policy statement: "HUD also believes that the market price used to determine whether a particular payment meets the reasonableness test may not include a referral fee or unearned fee, because such fees are prohibited by RESPA." 64 Fed.Reg. at 10086. The HUD statement even recognizes the potential for class based litigation: "The fees in cases or *classes* of transactions are illegal if they violate the prohibitions of Section 8 of RESPA." *Id.*, at 10084 (emphasis added).

In the facts before this court, the plaintiffs have alleged that the defendant does not link the payment of a yield spread premium to the performance of additional services by the broker. Plaintiffs' memorandum in support of plaintiffs' motion for class certification at 6. The plain-

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[1] In other words, a court, examining the nature of the fee in question, would always have to look at a particular loan with hindsight. No forward look at the manner in which a company received fees would ever be sufficient to determine if a company was violating the law under the defendant's proposed interpretation.

tiff's allegation is essentially that the higher the interest rate the broker can make a loan for, the higher the payment the lender will give to the broker, no matter how much or less work was involved in obtaining that particular loan as compared to others. *See* Exhibit E to plaintiffs' memorandum. *See also* Exhibit D to plaintiffs' memorandum, deposition of James Wilson, at 20-21:

> Q. But it's true, isn't it, that sometimes a broker is paid a yield spread premium by First Union?
>
> A. If he elects an above-par-priced loan, yes.
>
> Q. That's happened in the 44,000 transactions that we were talking about earlier, right?
>
> A. That a yield spread premium was paid?
>
> Q. Yes.
>
> A. I believe the 44,000 was the number of brokered loans that we had closed, of which approximately 50 percent were paid a yield spread premium.
>
> Q. You said that the broker earns a yield spread premium when it's an above-par loan. What do you mean by that?
>
> A. We price our loans – we, in the mortgage company, have a department, a secondary marketing department, that is responsible for pricing on a daily basis to both out retail distributing channels and our wholesale channels. The price is generally obtained in the morning, around 9:30 or 10:00, and we price to the various price levels that our investors require. And most of our loans are priced to Fannie Mae and Freddie Mac securities. So if you have – you have various note rates that we – that we procure from the Fannie, Freddie daily pricing screens which could have an above-par-price or a premium-price loan or a below-par-price or a discounted loan – and we offer those different price levels to our regional wholesale offices, who then send out a daily rate sheet to all of our independent mortgage brokers. So the brokers actually have the ability, depending on the needs of their

customers, to price a loan either at par, above par, or below par.

Under this set of allegations, common questions of fact do present themselves for determination. The court finds that the defendant's argument against class certification is focused not on the elements of Rule 23 Fed.R.Civ.P., but on the merits of the underlying claims of the plaintiffs. Under Rule 23, Fed.R.Civ.P., this court may not consider the underlying merits of the cause or causes of action stated by the plaintiffs. *See General Telephone Co.*, 457 U.S. at 161, 102 S.Ct. at 2372.

Based on this the above considerations, the court finds that the loans and transactions which constitute the basis for the potential class action will not require individual evaluation and inspection. The question of whether the "yield spread premiums" are referral fees is a common one that will apply to all of the potential class members. The threshold for commonality is not high. The "rule requires only that resolution of the common questions affect all or a substantial number of the class members." *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986). The class representatives' complaints regarding the "yield spread premium" paid in relation to their loan is common to and typical of the claims of the defined class.

The question regarding adequacy of representation is intertwined with the commonality and typicality analysis. *Washington*, 959 F.2d at 1569 n. 8. To satisfy the adequacy requirement the representatives must have claims similar to the rest of the class and the court must be satisfied that the representatives will vigorously litigate the interests of the class. *Andrews*, 95 F.3d at 1022. As the court has stated above, common questions of fact dominate the issues in this case. The plaintiffs were charged a yield spread premium by the defendant. The plaintiffs allege that each customer of the defendant charged a yield spread premium paid an illegal charge due to the manner in which the defendants assess the premiums. As such,

the plaintiffs' claims are typical of the claims of the proposed class.

The defendant further argues that the plaintiffs are not adequate class representatives because they signed disclosure forms regarding the yield spread premium they were charged. However, the plaintiff argues that the charge itself, in the manner it is imposed, is illegal. If the plaintiffs can establish this claim, then the fact that the plaintiffs signed a disclosure form will not effect their claim against defendants.[2]

Rule 23(b)(3), Fed.R.Civ.P. Requirements

Under Rule 23(b), Fed.R.Civ.P., a class action is maintainable when either (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications which would establish incompatible standards of conduct for the party opposing the class or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

This court finds that Rule 23(b)(3) is most applicable to this litigation. Under Rule 23(b)(3), Fed.R.Civ.P., this court must examine four factors to determine if this

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[2] The other side of this argument is, of course, that the defendants establish that the yield spread premiums and the manner in which they are imposed is legal, in which case the plaintiffs will be unable to prevail on the merits. In either situation, the plaintiffs are adequate class representatives, regardless of the disclosure form. The court is uncertain however, whether the defendants are arguing that there are potential class members who were charged a yield spread premium which was not disclosed to those individuals.

method of proceeding is superior to other available methods for the fair and efficient adjudication of the controversy. These are: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

No gain is conceivable from each of the class members getting to prosecute this case in his or her own name. In the testimony quoted, *supra*, a representative of the defendant alleges that the yield spread premiums in question were included in approximately 22,000 loans. This court can find no advantage to an additional 22,000 cases being brought before it. Similarly, no significant difficulties are presently foreseeable in the management of the class. The additional Rule 23(b)(3) requirement that "the questions of law or fact common to the members of the class predominate . . ." is met as well. The question of whether the "yield spread premium" paid by the defendant is one for service compensation is clearly the predominating question for the proposed class.

Conclusion

After having reviewed the evidentiary submissions, filings, and conducted a hearing, this court is of the opinion that the proposed representatives of the action and their counsel are adequate for purposes of class litigation. This court is further of the opinion that class based litigation is the superior method for this litigation based on the numerous claims, common issues, and nature of the action.

It is therefore ORDERED that plaintiffs' motion for class certification be and hereby is GRANTED.

DONE and ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
(Atlanta Division)

Civil Action No. 1:98-CV-1032-ODE

PAMELA C. HIRSCH AND DAVID L. HIRSCH, JOINTLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BANKAMERICA CORPORATION, A DELAWARE CORPORATION; AND BANK OF AMERICA FSB, INCORPORATED UNDER THE LAWS OF THE UNITED STATES OF AMERICA, ALSO DOING BUSINESS AS BANKAMERICA MORTGAGE, A DIVISION OF BANKAMERICA FSB,
Defendants.

Civil Action No. 1:98-CV-1031-ODE

BETH A. RICHARDSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BANKAMERICA CORPORATION, A DELAWARE CORPORATION; AND BANK OF AMERICA FSB, INCORPORATED UNDER THE LAWS OF THE UNITED STATES OF AMERICA, ALSO DOING BUSINESS AS BANKAMERICA MORTGAGE, A DIVISION OF BANKAMERICA FSB,
Defendants.

[Decided April 20, 1999]

ORDER

These consolidated civil actions, filed pursuant to the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 et seq., are before the court on Plaintiffs' motions for class certification.

Plaintiffs David L. Hirsch and Pamela Hirsch ("Plaintiffs Hirsch") allege that Defendants paid to Rodgers Mortgage Co., a mortgage broker, a referral fee or a kickback in the form of a "yield spread premium".[1] Plaintiffs Hirsch state that their mortgage broker helped them get a federally-related mortgage loan from Defendant for the purchase of their residence. The interest rate quoted to Plaintiffs Hirsch by their mortgage broker was above the "par rate" offered by Defendants. On June 20, 1996, Plaintiffs Hirsch entered into a mortgage loan contract with Defendants BankAmerica. At the closing, Defendants gave Plaintiffs a HUD-1 settlement statement which disclosed that mortgage broker would receive a yield spread premium from Defendants in the amount of $375.00. Plaintiffs Hirsch contend that this money was a kickback or fee for referring Plaintiffs to Defendants. Plaintiffs state that the fee was for the referral of Plaintiffs' and other putative class members' above par loans, and was illegal under RESPA.

Plaintiff Beth A. Richardson ("Richardson") similarly states that she entered into a mortgage loan contract with Defendants on March 26, 1997, and alleges that Defendants unlawfully kicked back a yield spread premium of $600 of the loan principal to her mortgage broker, Atlanta

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[1] " 'Yield spread premiums' are payments made by a mortgage lender to a mortgage broker on an 'above par' loan brought to the lender by the broker. To be 'above par' is to be above the current going rate, to be above the lowest rate that a lender will offer without charging 'discount points.' In crude terms, therefore, the yield spread premium is (allegedly) simply a payment made by the lender to the broker in return for the broker having brought the lender a high interest loan." *Taylor v. Flagstar Bank, FSB*, 181 F.R.D. 509, 511, 1998 WL 420679 *1 (M.D. Ala. July 21, 1998).

American Mortgage of Columbus, in exchange for her above par loan.

Plaintiffs Hirsch seek to bring this action on behalf of themselves and all other similarly situated which consists of:

> All persons residing in the United States and its territories who, during the period of January 12, 1996, forward, obtained a mortgage loan from a mortgage broker where the loan was funded and owned by Defendants BankAmerica, where the loan was a federally-related mortgage loan, and where a loan origination fee or other compensation was paid to the mortgage broker by the borrower, where the HUD-1 or HUD-1A form or other mortgage loan documentation shows a yield spread premium, par rate plus premium, premium pricing fee or service release premium, however denominated, was paid the mortgage broker by the lender, Defendants BankAmerica.

[Plaintiffs' motion for class certification at 2].

Plaintiff Richardson seeks to bring this action on behalf of herself and all other similarly situated which consists of:

> All persons residing in the United States and its territories who, during the period of January 15, 1997, forward, obtained a mortgage loan from a mortgage broker where the loan was funded and owned by Defendants BankAmerica, where the loan was a federally-related mortgage loan, and where a loan origination fee or other compensation was paid to the mortgage broker by the borrower, where the HUD-1 or HUD-1A form or other mortgage loan documentation shows a yield spread premium, par rate plus premium, premium pricing fee or service release premium, however denominated, was paid the mortgage broker by the lender, Defendants BankAmerica.

In order to obtain certification of the proposed class, Plaintiffs must demonstrate that:

> 1) the class is so numerous that joinder of all members is impracticable, 2) there are questions of law or fact common to the class, 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and 4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

Defendants contend that even assuming arguendo that Plaintiffs could satisfy the requirements of Fed.R.Civ.P. 23(a), they cannot satisfy the requirements of Fed.R. Civ.P. 23(b) and show that, "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). *See Marinaccio v. Barnett Banks, Inc.*, 176 F.R.D. 104, 106 (S.D.N.Y. 1997).

In order to prevail under RESPA section 8, Plaintiffs must show that the challenged yield spread premiums are for something other than for "services actually performed." 12 U.S.C. § 2607; *Marinaccio v. Barnett Banks, Inc.*, 176 F.R.D. 104, 106 (S.D.N.Y. 1997). The Eleventh Circuit noted in *Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692 (11th Cir. 1998) ("Culpepper I"), where there was a similar charge of improper referral fees, that "mortgage transactions are structured in a variety of ways," and liability under RESPA is "highly dependent upon the facts [of the] particular financial transaction." *Id.* at 697 n.5. *See Jackson v. Ford Consumer Finance et al.*, 181 F.R.D. 537, 539 (N.D. Ga. 1998). As payment of a yield spread premium is not a per se violation of RESPA section 8, *Culpepper v. Inland Mortgage Corp.*, 144 F.3d 717 (11th Cir. 1998) ('Culpepper II"), certification would require analysis of each of the individual transactions included in the proposed class so as "to determine whether any of the challenged [yield spread premium] payments were not reasonably related to the value of the 'services actually

performed.'" *Marinaccio*, 176 F.R.D. 104 at 107, quoting, 12 U.S.C. § 2607(c).

The court, like many district courts preceding, finds that "individual factual questions predominate over any questions common to the class rendering administration of such a class action impractical" and Plaintiffs' motions for class certification are denied. *Id. See Dierker v. Cimarron Mortgage Co.*, 1999 U.S. Dist. LEXIS 20591, No. 2:98-CV-30-WCO, slip op. (N.D. Ga. Jan. 19, 1999); *Paul v. National City Mortgage Co.*, 1999 U.S. Dist. LEXIS 20512, 1:98-CV-216-WBH, slip op. (N.D. Ga. March 11, 1999); *Moniz v. Crossland Mortgage Corp.*, 175 F.R.D. 1 (D. Mass. 1997); *Taylor v. Flagstar Bank, FSB*, 181 F.R.D. 509, 1998 WL 420679 (M.D. Ala. July 21, 1998); *Hinton v. First American Mortgage*, 1998 U.S. Dist. LEXIS 2712, 1998 WL 111668 (N.D. Ill. March 3, 1998); *Conomos v. Chase Manhattan Corp.*, 1998 U.S. Dist. LEXIS 3135, 1998 WL 118154 (S.D.N.Y. March 17, 1998).

But see Dujanovic v. MortgageAmerica, Inc., 185 F.R.D. 660 (N.D. Ala. 1999) (court certified class because it was "not persuaded that individual inquiries will be required in this case" because plaintiff asserted that the yield spread premium paid to the broker by the lender did not represent payment for goods or services at all and, thereby, violated the RESPA prescription against referral fees); *Brancheau v. Residential Mortgage*, 182 F.R.D. 579, 1998 WL 633953 (D. Minn. 1998) (court certified the class because it found that the reasonableness analysis only becomes necessary if it is established that the yield spread premium was compensation for services. The court found that because it was this prong of the inquiry at issue, Plaintiff satisfied the predominance requirement).

Accordingly, Plaintiffs' motions for class certification [1032 - #50; 1031 - #44] are hereby DENIED. Plaintiffs' motions for leave to file excess pages [1032 - #56; 1031 - #50] are hereby GRANTED *Nun Pro Tunc*. Defendants' motions for leave to file supplemental memoranda in opposition to Plaintiffs' motion for class certification and

objection to Plaintiffs' expert affidavit [1032 - #58; 1031 - #52] are hereby DENIED.

SO ORDERED, this 20 day of April, 1999.

/s/ ORINDA D. EVANS
Orinda D. Evans
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14066-TT

DANIEL HEIMMERMANN, INDIVIDUALLY AND
ON BEHALF OF THEMSELVES AND A CLASS DESCRIBED,
EMILY HEIMMERMANN, INDIVIDUALLY AND
ON BEHALF OF THEMSELVES AND A CLASS DESCRIBED,
Plaintiffs-Appellees,

v.

FIRST UNION MORTGAGE CORPORATION,
Defendant-Appellant.

[Filed November 26, 2002]

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, _____F.2d _____)

Before: EDMONDSON, CARNES and GIBSON*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

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* Honorable John R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/s/ J.L. EDMONDSON
CHIEF JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11554-TT

BETH A. RICHARDSON,
Plaintiff-Appellant,

v.

BANKAMERICA CORPORATION, A DELAWARE CORPORATION, BANK OF AMERICA FSB, INC., A HAWAII CORPORATION, INCORPORATED UNDER THE LAWS OF THE UNITED STATES OF AMERICA, D.B.A BANKAMERICA MORTGAGE,
Defendants-Appellees.

PAMELA C. HIRSCH, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, DAVID L. HIRSCH,
Plaintiffs-Appellants,

v.

BANKAMERICA CORPORATION, A DELAWARE CORPORATION, BANK OF AMERICA FSB, INC., A HAWAII CORPORATION, BANKAMERICA MORTGAGE, A DIVISION OF BANKAMERICA FSB, A HAWAII CORPORATION,
Defendants-Appellees.

[Filed March 17, 2003]

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, _____F.2d _____)

Before: EDMONDSON, Chief Judge, COX and GIBSON*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/s/ J.L. EDMONDSON
CHIEF JUDGE

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* Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX G

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

February 20, 2003

Mr. David C. Frederick
Kellogg, Huber, Hansen, et al.
1615 M Street, N.W., Suite 400
Washington, DC 20036

Re: Daniel Heimmermann, etc., et al. v. First Union Mortgage Corporation
Application No. 02A687

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on February 20, 2003, extended the time to and including March 26, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
By
/s/ JEFFREY D. ATKINS
Jeffrey D. Atkins
Assistant Clerk

[attached notification list omitted]

APPENDIX H

Statutory Provisions

The Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §§ 2601 *et seq.*, provides in pertinent part as follows:

12 U.S.C. § 2601. Congressional findings and purpose

(a) The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. The Congress also finds that it has been over two years since the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs submitted their joint report to the Congress on "Mortgage Settlement Costs" and that the time has come for the recommendations for Federal legislative action made in that report to be implemented.

(b) It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result –

(1) in more effective advance disclosure to home buyers and sellers of settlement costs;

(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;

(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and

(4) in significant reform and modernization of local recordkeeping of land title information.

12 U.S.C. § 2602. Definitions

For purposes of this chapter –

(1) the term "federally related mortgage loan" includes any loan (other than temporary financing such as a construction loan) which –

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B)(i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government; or

(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or

(iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation; or

(iv) is made in whole or in part by any "creditor", as defined in section 1602(f) of title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year, except that for the purpose of this chapter, the term "creditor" does not include any agency or instrumentality of any State;

(2) the term "thing of value" includes any payment, advance, funds, loan, service, or other consideration;

(3) the term "Settlement services" includes any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement;

(4) the term "title company" means any institution which is qualified to issue title insurance, directly or through its agents, and also refers to any duly authorized agent of a title company;

(5) the term "person" includes individuals, corporations, associations, partnerships, and trusts;

(6) the term "Secretary" means the Secretary of Housing and Urban Development;

(7) the term "affiliated business arrangement" means an arrangement in which (A) a person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services; and (B) either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider; and

(8) the term "associate" means one who has one or more of the following relationships with a person in a position to refer settlement business: (A) a spouse, parent, or child of such person; (B) a corporation or busi-

ness entity that controls, is controlled by, or is under common control with such person; (C) an employer, officer, director, partner, franchisor, or franchisee of such person; or (D) anyone who has an agreement, arrangement, or understanding, with such person, the purpose or substantial effect of which is to enable the person in a position to refer settlement business to benefit financially from the referrals of such business.

12 U.S.C. § 2603. Uniform settlement statement

(a) The Secretary, in consultation with the Administrator of Veteran's Affairs, the Federal Deposit Insurance Corporation, and the Director of the Office of Thrift Supervision, shall develop and prescribe a standard form for the statement of settlement costs which shall be used (with such variations as may be necessary to reflect differences in legal and administrative requirements or practices in different areas of the country) as the standard real estate settlement form in all transactions in the United States which involve federally related mortgage loans. Such form shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement and shall indicate whether any title insurance premium included in such charges covers or insures the lender's interest in the property, the borrower's interest, or both. The Secretary may, by regulation, permit the deletion from the form prescribed under this section of items which are not, under local laws or customs, applicable in any locality, except that such regulation shall require that the numerical code prescribed by the Secretary be retained in forms to be used in all localities. Nothing in this section may be construed to require that that part of the standard form which relates to the borrower's transaction be furnished to the seller, or to require that that part of the standard form which relates to the seller be furnished to the borrower.

(b) The form prescribed under this section shall be completed and made available for inspection by the borrower at or before settlement by the person conducting the settlement, except that (1) the Secretary may exempt from the requirements of this section settlements occurring in localities where the final settlement statement is not customarily provided at or before the date of settlement, or settlements where such requirements are impractical and (2) the borrower may, in accordance with regulations of the Secretary, waive his right to have the form made available at such time. Upon the request of the borrower to inspect the form prescribed under this section during the business day immediately preceding the day of settlement, the person who will conduct the settlement shall permit the borrower to inspect those items which are known to such person during such preceding day.

12 U.S.C. § 2605. Servicing of mortgage loans and administration of escrow accounts

(a) Disclosure to applicant relating to assignment, sale, or transfer of loan servicing

Each person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding.

(b) Notice by transferor of loan servicing at time of transfer

(1) Notice requirement

Each servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person.

(2) Time of notice

(A) In general

Except as provided under subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not less than 15 days before the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by –

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice

The notice required under paragraph (1) shall include the following information:

(A) The effective date of transfer of the servicing described in such paragraph.

(B) The name, address, and toll-free or collect call telephone number of the transferee servicer.

(C) A toll-free or collect call telephone number for (i) an individual employed by the transferor servicer, or (ii) the department of the transferor servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(D) The name and toll-free or collect call telephone number for (i) an individual employed by the transferee servicer, or (ii) the department of the transferee servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(E) The date on which the transferor servicer who is servicing the mortgage loan before the assignment, sale, or transfer will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments.

(F) Any information concerning the effect the transfer may have, if any, on the terms of or the continued availability of mortgage life or disability insurance or any other type of optional insurance and what action, if any, the borrower must take to maintain coverage.

(G) A statement that the assignment, sale, or transfer of the servicing of the mortgage loan does not affect any term or condition of the security instruments other than terms directly related to the servicing of such loan.

(c) Notice by transferee of loan servicing at time of transfer

(1) Notice requirement

Each transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold, or

transferred shall notify the borrower of any such assignment, sale, or transfer.

(2) Time of notice

(A) In general

Except as provided in subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not more than 15 days after the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by –

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice

Any notice required under paragraph (1) shall include the information described in subsection (b)(3) of this section.

(d) Treatment of loan payments during transfer period

During the 60-day period beginning on the effective date of transfer of the servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who should properly receive payment) before the due date applicable to such payment.

(e) Duty of loan servicer to respond to borrower inquiries

(1) Notice of receipt of inquiry

(A) In general

If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.

(B) Qualified written request

For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that –

(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

(2) Action with respect to inquiry

Not later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall –

(A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);

(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes –

(i) to the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes –

(i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

(3) Protection of credit rating

During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of title 15).

(f) Damages and costs

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) Individuals

In the case of any action by an individual, an amount equal to the sum of –

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $1,000.

(2) Class actions

In the case of a class action, an amount equal to the sum of –

(A) any actual damages to each of the borrowers in the class as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not greater than $1,000 for each member of the class, except that the total amount of damages

under this subparagraph in any class action may not exceed the lesser of –

(i) $500,000; or

(ii) 1 percent of the net worth of the servicer.

(3) Costs

In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.

(4) Nonliability

A transferor or transferee servicer shall not be liable under this subsection for any failure to comply with any requirement under this section if, within 60 days after discovering an error (whether pursuant to a final written examination report or the servicer's own procedures) and before the commencement of an action under this subsection and the receipt of written notice of the error from the borrower, the servicer notifies the person concerned of the error and makes whatever adjustments are necessary in the appropriate account to ensure that the person will not be required to pay an amount in excess of any amount that the person otherwise would have paid.

(g) Administration of escrow accounts

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due.

(h) Preemption of conflicting State laws

Notwithstanding any provision of any law or regulation of any State, a person who makes a federally related

mortgage loan or a servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under this section regarding timing, content, and procedures for notification of the borrower.

(i) Definitions

For purposes of this section:

(1) Effective date of transfer

The term "effective date of transfer" means the date on which the mortgage payment of a borrower is first due to the transferee servicer of a mortgage loan pursuant to the assignment, sale, or transfer of the servicing of the mortgage loan.

(2) Servicer

The term "servicer" means the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan). The term does not include –

(A) the Federal Deposit Insurance Corporation or the Resolution Trust Corporation, in connection with assets acquired, assigned, sold, or transferred pursuant to section 1823(c) of this title or as receiver or conservator of an insured depository institution; and

(B) the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Resolution Trust Corporation, or the Federal Deposit Insurance Corporation, in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by –

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(3) Servicing

The term "servicing" means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

(j) Transition

(1) Originator liability

A person who makes a federally related mortgage loan shall not be liable to a borrower because of a failure of such person to comply with subsection (a) of this section with respect to an application for a loan made by the borrower before the regulations referred to in paragraph (3) take effect.

(2) Servicer liability

A servicer of a federally related mortgage loan shall not be liable to a borrower because of a failure of the servicer to perform any duty under subsection (b), (c), (d), or (e) of this section that arises before the regulations referred to in paragraph (3) take effect.

(3) Regulations and effective date

The Secretary shall, by regulations that shall take effect not later than April 20, 1991, establish any requirements necessary to carry out this section. Such regulations shall include the model disclosure statement required under subsection (a)(2) of this section.

12 U.S.C. § 2607. Prohibition against kickbacks and unearned fees

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a no-

tation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, within 3 business days after the referral by telephone, (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Secretary, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting

agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

12 U.S.C. § 2614. Jurisdiction of courts; limitations

Any action pursuant to the provisions of section 2605, 2607, or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred, within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation, except that actions brought by the Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the violation.

12 U.S.C. § 2617. Authority of Secretary

(a) Issuance of regulations; exemptions

The Secretary is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this chapter.

(b) Liability for acts done in good faith in conformity with rule, regulation, or interpretation

No provision of this chapter or the laws of any State imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Secretary or the Attorney General, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(c) Investigations; hearings; failure to obey order; contempt

(1) The Secretary may investigate any facts, conditions, practices, or matters that may be deemed necessary or proper to aid in the enforcement of the provisions of this chapter, in prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning real estate settlement practices. To aid in the investigations, the Secretary is authorized to hold such hearings, administer such oaths, and require by subpena the attendance and testimony of such witnesses and production of such documents as the Secretary deems advisable.

(2) Any district court of the United States within the jurisdiction of which an inquiry is carried on may, in the case of contumacy or refusal to obey a subpena of the Secretary issued under this section, issue an order requiring compliance therewith; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Delay of effectiveness of recent final regulation relating to payments to employees

(1) In general

The amendment to part 3500 of title 24 of the Code of Federal Regulations contained in the final regulation prescribed by the Secretary and published in the Federal Register on June 7, 1996, which will, as of the effective date of such amendment –

(A) eliminate the exemption for payments by an employer to employees of such employer for refer- ral activities which is currently codified as section 3500.14(g)(1)(vii) of such title 24; and

(B) replace such exemption with a more limited exemption in new clauses (vii), (viii), and (ix) of section 3500.14 of such title 24,

shall not take effect before July 31, 1997.

(2) Continuation of prior rule

The regulation codified as section 3500.14(g)(1)(vii) of title 24 of the Code of Federal Regulations, relating to employer-employee payments, as in effect on May 1, 1996, shall remain in effect until the date the amendment referred to in paragraph (1) takes effect in accordance with such paragraph.

(3) Public notice of effective date

The Secretary shall provide public notice of the date on which the amendment referred to in paragraph (1) will take effect in accordance with such paragraph not less than 90 days and not more than 180 days before such effective date.

Regulatory Provisions

Regulation X, Part 3500 of Title 24 of the Code of Federal Regulations, provides in pertinent part as follows:

PART 3500–REAL ESTATE SETTLEMENT PROCEDURES ACT

24 C.F.R. § 3500.1 Designation.

This part may be referred to as Regulation X.

24 C.F.R. § 3500.2 Definitions.

(a) *Statutory terms.* All terms defined in RESPA (12 U.S.C. 2602) are used in accordance with their statutory meaning unless otherwise defined in paragraph (b) of this section or elsewhere in this part.

(b) *Other terms.* As used in this part:

Application means the submission of a borrower's financial information in anticipation of a credit decision, whether written or computer-generated, relating to a federally related mortgage loan. If the submission does not state or identify a specific property, the submission is an application for a pre-qualification and not an application for a federally related mortgage loan under this part. The subsequent addition of an identified property to the submission converts the submission to an application for a federally related mortgage loan.

Business day means a day on which the offices of the business entity are open to the public for carrying on substantially all of the entity's business functions.

Dealer means, in the case of property improvement loans, a seller, contractor, or supplier of goods or services. In the case of manufactured home loans, "dealer" means one who engages in the business of manufactured home retail sales.

Dealer loan or dealer consumer credit contract means, generally, any arrangement in which a dealer assists the borrower in obtaining a federally related mortgage loan from the funding lender and then assigns the dealer's legal interests to the funding lender and receives the net proceeds of the loan. The funding lender is the lender for the purposes of the disclosure requirements of this part. If a dealer is a "creditor" as defined under the definition of "federally related mortgage loan" in this part, the dealer is the lender for purposes of this part.

Effective date of transfer is defined in section 6(i)(1) of RESPA (12 U.S.C. 2605(i)(1)). In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, the effective date of transfer is the transfer date agreed upon by the transferee servicer and the transferor servicer.

Federally related mortgage loan or mortgage loan means as follows:

(1) Any loan (other than temporary financing, such as a construction loan):

(i) That is secured by a first or subordinate lien on residential real property, including a refinancing of any secured loan on residential real property upon which there is either:

(A) Located or, following settlement, will be constructed using proceeds of the loan, a structure or structures designed principally for occupancy of from one to four families (including individual units of condominiums and cooperatives and including any related interests, such as a share in the cooperative or right to occupancy of the unit); or

(B) Located or, following settlement, will be placed using proceeds of the loan, a manufactured home; and

(ii) For which one of the following paragraphs applies. The loan:

(A) Is made in whole or in part by any lender that is either regulated by or whose deposits or accounts are insured by any agency of the Federal Government;

(B) Is made in whole or in part, or is insured, guaranteed, supplemented, or assisted in any way:

(1) By the Secretary or any other officer or agency of the Federal Government; or

(2) Under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other officer or agency of the Federal Government;

(C) Is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation (or its successors), or a financial institution from which the loan is to be purchased by the Federal Home Loan Mortgage Corporation (or its successors);

(D) Is made in whole or in part by a "creditor", as defined in section 103(f) of the Consumer Credit Protection Act (15 U.S.C. 1602(f)), that makes or invests in residential real estate loans aggregating more than $1,000,000 per year. For purposes of this definition, the term "creditor" does not include any agency or instrumentality of any State, and the term "residential real estate loan" means any loan secured by residential real property, including single-family and multifamily residential property;

(E) Is originated either by a dealer or, if the obligation is to be assigned to any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition, by a mortgage broker; or

(F) Is the subject of a home equity conversion mortgage, also frequently called a "reverse mortgage," issued by any maker of mortgage loans specified in paragraphs (1)(ii) (A) through (D) of this definition.

(2) Any installment sales contract, land contract, or contract for deed on otherwise qualifying residential prop-

erty is a federally related mortgage loan if the contract is funded in whole or in part by proceeds of a loan made by any maker of mortgage loans specified in paragraphs (1)(ii) (A) through (D) of this definition.

(3) If the residential real property securing a mortgage loan is not located in a State, the loan is not a federally related mortgage loan.

Good faith estimate means an estimate, prepared in accordance with section 5 of RESPA (12 U.S.C. 2604), of charges that a borrower is likely to incur in connection with a settlement.

HUD-1 or HUD-1A settlement statement (also *HUD-1 or HUD-1A*) means the statement that is prescribed by the Secretary in this part for setting forth settlement charges in connection with either the purchase or the refinancing (or other subordinate lien transaction) of 1- to 4-family residential property.

Lender means, generally, the secured creditor or creditors named in the debt obligation and document creating the lien. For loans originated by a mortgage broker that closes a federally related mortgage loan in its own name in a table funding transaction, the lender is the person to whom the obligation is initially assigned at or after settlement. A lender, in connection with dealer loans, is the lender to whom the loan is assigned, unless the dealer meets the definition of creditor as defined under "federally related mortgage loan" in this section. See also § 3500.5(b)(7), secondary market transactions.

Managerial employee means an employee of a settlement service provider who does not routinely deal directly with consumers, and who either hires, directs, assigns, promotes, or rewards other employees or independent contractors, or is in a position to formulate, determine, or influence the policies of the employer. Neither the term "managerial employee" nor the term "employee" includes independent contractors, but a managerial employee may hold a real estate brokerage or agency license.

Manufactured home is defined in § 3280.2 of this title.

Mortgage broker means a person (not an employee or exclusive agent of a lender) who brings a borrower and lender together to obtain a federally related mortgage loan, and who renders services as described in the definition of "settlement services" in this section. A loan correspondent approved under § 202.8 of this title for Federal Housing Administration programs is a mortgage broker for purposes of this part.

Mortgaged property means the real property that is security for the federally related mortgage loan.

Person is defined in section 3(5) of RESPA (12 U.S.C. 2602(5)).

Public Guidance Documents means documents that HUD has published in the FEDERAL REGISTER, and that it may amend from time-to-time by publication in the FEDERAL REGISTER. These documents are also available from HUD at the address indicated in 24 CFR 3500.3.

Refinancing means a transaction in which an existing obligation that was subject to a secured lien on residential real property is satisfied and replaced by a new obligation undertaken by the same borrower and with the same or a new lender. The following shall not be treated as a refinancing, even when the existing obligation is satisfied and replaced by a new obligation with the same lender (this definition of "refinancing" as to transactions with the same lender is similar to Regulation Z, 12 CFR 226.20(a)):

(1) A renewal of a single payment obligation with no change in the original terms;

(2) A reduction in the annual percentage rate as computed under the Truth in Lending Act with a corresponding change in the payment schedule;

(3) An agreement involving a court proceeding;

(4) A workout agreement, in which a change in the payment schedule or change in collateral requirements is agreed to as a result of the consumer's default or delinquency, unless the rate is increased or the new amount

financed exceeds the unpaid balance plus earned finance charges and premiums for continuation of allowable insurance; and

(5) The renewal of optional insurance purchased by the consumer that is added to an existing transaction, if disclosures relating to the initial purchase were provided.

Regulation Z means the regulations issued by the Board of Governors of the Federal Reserve System (12 CFR part 226) to implement the Federal Truth in Lending Act (15 U.S.C. 1601 *et seq.*), and includes the Commentary on Regulation Z.

Required use means a situation in which a person must use a particular provider of a settlement service in order to have access to some distinct service or property, and the person will pay for the settlement service of the particular provider or will pay a charge attributable, in whole or in part, to the settlement service. However, the offering of a package (or combination of settlement services) or the offering of discounts or rebates to consumers for the purchase of multiple settlement services does not constitute a required use. Any package or discount must be optional to the purchaser. The discount must be a true discount below the prices that are otherwise generally available, and must not be made up by higher costs elsewhere in the settlement process.

RESPA means the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq.*

Servicer means the person responsible for the servicing of a mortgage loan (including the person who makes or holds a mortgage loan if such person also services the mortgage loan). The term does not include:

(1) The Federal Deposit Insurance Corporation (FDIC) or the Resolution Trust Corporation (RTC), in connection with assets acquired, assigned, sold, or transferred pursuant to section 13(c) of the Federal Deposit Insurance Act or as receiver or conservator of an insured depository institution; and

(2) The Federal National Mortgage Corporation (FNMA); the Federal Home Loan Mortgage Corporation (Freddie Mac); the RTC; the FDIC; HUD, including the Government National Mortgage Association (GNMA) and the Federal Housing Administration (FHA) (including cases in which a mortgage insured under the National Housing Act (12 U.S.C. 1701 *et seq.*) is assigned to HUD); the National Credit Union Administration (NCUA); the Farmers Home Administration or its successor agency under Public Law 103-354 (FmHA); and the Department of Veterans Affairs (VA), in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by termination of the contract for servicing the loan for cause, commencement of proceedings for bankruptcy of the servicer, or commencement of proceedings by the FDIC or RTC for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

Servicing means receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts under section 10 of RESPA (12 U.S.C. 2609), and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, servicing includes making payments to the borrower.

Settlement means the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. This process may also be called "closing" or "escrow" in different jurisdictions.

Settlement service means any service provided in connection with a prospective or actual settlement, including, but not limited to, any one or more of the following:

(1) Origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of such loans);

(2) Rendering of services by a mortgage broker (including counseling, taking of applications, obtaining verifications and appraisals, and other loan processing and origination services, and communicating with the borrower and lender);

(3) Provision of any services related to the origination, processing or funding of a federally related mortgage loan;

(4) Provision of title services, including title searches, title examinations, abstract preparation, insurability determinations, and the issuance of title commitments and title insurance policies;

(5) Rendering of services by an attorney;

(6) Preparation of documents, including notarization, delivery, and recordation;

(7) Rendering of credit reports and appraisals;

(8) Rendering of inspections, including inspections required by applicable law or any inspections required by the sales contract or mortgage documents prior to transfer of title;

(9) Conducting of settlement by a settlement agent and any related services;

(10) Provision of services involving mortgage insurance;

(11) Provision of services involving hazard, flood, or other casualty insurance or homeowner's warranties;

(12) Provision of services involving mortgage life, disability, or similar insurance designed to pay a mortgage loan upon disability or death of a borrower, but only if such insurance is required by the lender as a condition of the loan;

(13) Provision of services involving real property taxes or any other assessments or charges on the real property;

(14) Rendering of services by a real estate agent or real estate broker; and

(15) Provision of any other services for which a settlement service provider requires a borrower or seller to pay.

Special information booklet means the booklet prepared by the Secretary pursuant to section 5 of RESPA (12 U.S.C. 2604) to help persons understand the nature and costs of settlement services. The Secretary publishes the form of the special information booklet in the FEDERAL REGISTER. The Secretary may issue or approve additional booklets or alternative booklets by publication of a Notice in the FEDERAL REGISTER.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. A table-funded transaction is not a secondary market transaction (see § 3500.5(b)(7)).

Title company means any institution, or its duly authorized agent, that is qualified to issue title insurance.

24 C.F.R. § 3500.4 Reliance upon rule, regulation or interpretation by HUD.

(a) *Rule, regulation or interpretation.* (1) For purposes of sections 19(a) and (b) of RESPA (12 U.S.C. 2617(a) and (b)) only the following constitute a rule, regulation or interpretation of the Secretary:

(i) All provisions, including appendices, of this part. Any other document referred to in this part is not incorporated in this part unless it is specifically set out in this part;

(ii) Any other document that is published in the FEDERAL REGISTER by the Secretary and states that it is an "interpretation," "interpretive rule," "commentary," or a "statement of policy" for purposes of section 19(a) of

RESPA. Such documents will be prepared by HUD staff and counsel. Such documents may be revoked or amended by a subsequent document published in the *Federal Register* by the Secretary.

(2) A "rule, regulation, or interpretation thereof by the Secretary" for purposes of section 19(b) of RESPA (12 U.S.C. 2617(b)) shall not include the special information booklet prescribed by the Secretary or any other statement or issuance, whether oral or written, by an officer or representative of the Department of Housing and Urban Development (HUD), letter or memorandum by the Secretary, General Counsel, any Assistant Secretary or other officer or employee of HUD, preamble to a regulation or other issuance of HUD, Public Guidance Document, report to Congress, pleading, affidavit or other document in litigation, pamphlet, handbook, guide, telegraphic communication, explanation, instructions to forms, speech or other material of any nature which is not specifically included in paragraph (a)(1) of this section.

(b) *Unofficial interpretations; staff discretion.* In response to requests for interpretation of matters not adequately covered by this part or by an official interpretation issued under paragraph (a)(1)(ii) of this section, unofficial staff interpretations may be provided at the discretion of HUD staff or counsel. Written requests for such interpretations should be directed to the address indicated in § 3500.3. Such interpretations provide no protection under section 19(b) of RESPA (12 U.S.C. 2617(b)). Ordinarily, staff or counsel will not issue unofficial interpretations on matters adequately covered by this part or by official interpretations or commentaries issued under paragraph (a)(1)(ii) of this section.

(c) All informal counsel's opinions and staff interpretations issued before November 2, 1992, were withdrawn as of that date. Courts and administrative agencies, however, may use previous opinions to determine the validity of conduct under the previous Regulation X.

24 C.F.R. § 3500.5 Coverage of RESPA.

(a) *Applicability.* RESPA and this part apply to all federally related mortgage loans, except for the exemptions provided in paragraph (b) of this section.

(b) *Exemptions.* (1) A loan on property of 25 acres or more.

(2) *Business purpose loans.* An extension of credit primarily for a business, commercial, or agricultural purpose, as defined by Regulation Z, 12 CFR 226.3(a)(1). Persons may rely on Regulation Z in determining whether the exemption applies.

(3) *Temporary financing.* Temporary financing, such as a construction loan. The exemption for temporary financing does not apply to a loan made to finance construction of 1- to 4-family residential property if the loan is used as, or may be converted to, permanent financing by the same lender or is used to finance transfer of title to the first user. If a lender issues a commitment for permanent financing, with or without conditions, the loan is covered by this part. Any construction loan for new or rehabilitated 1- to 4-family residential property, other than a loan to a bona fide builder (a person who regularly constructs 1- to 4-family residential structures for sale or lease), is subject to this part if its term is for two years or more. A "bridge loan" or "swing loan" in which a lender takes a security interest in otherwise covered 1- to 4-family residential property is not covered by RESPA and this part.

(4) *Vacant land.* Any loan secured by vacant or unimproved property, unless within two years from the date of the settlement of the loan, a structure or a manufactured home will be constructed or placed on the real property using the loan proceeds. If a loan for a structure or manufactured home to be placed on vacant or unimproved property will be secured by a lien on that property, the transaction is covered by this part.

(5) *Assumption without lender approval.* Any assumption in which the lender does not have the right expressly to approve a subsequent person as the borrower on an ex-

isting federally related mortgage loan. Any assumption in which the lender's permission is both required and obtained is covered by RESPA and this part, whether or not the lender charges a fee for the assumption.

(6) *Loan conversions.* Any conversion of a federally related mortgage loan to different terms that are consistent with provisions of the original mortgage instrument, as long as a new note is not required, even if the lender charges an additional fee for the conversion.

(7) *Secondary market transactions.* A *bona fide* transfer of a loan obligation in the secondary market is not covered by RESPA and this part, except as set forth in section 6 of RESPA (12 U.S.C. 2605) and § 3500.21. In determining what constitutes a *bona fide* transfer, HUD will consider the real source of funding and the real interest of the funding lender. Mortgage broker transactions that are table-funded are not secondary market transactions. Neither the creation of a dealer loan or dealer consumer credit contract, nor the first assignment of such loan or contract to a lender, is a secondary market transaction (see § 3500.2.)

24 C.F.R. § 3500.8 Use of HUD-1 or HUD-1A settlement statements.

(a) *Use by settlement agent.* The settlement agent shall use the HUD-1 settlement statement in every settlement involving a federally related mortgage loan in which there is a borrower and a seller. For transactions in which there is a borrower and no seller, such as refinancing loans or subordinate lien loans, the HUD-1 may be utilized by using the borrower's side of the HUD-1 statement. Alternatively, the form HUD-1A may be used for these transactions. Either the HUD-1 or the HUD-1A, as appropriate, shall be used for every RESPA-covered transaction, unless its use is specifically exempted, but the HUD-1 or HUD-1A may be modified as permitted under this part. The use of the HUD-1 or HUD-1A is exempted for

open-end lines of credit (home- equity plans) covered by the Truth in Lending Act and Regulation Z.

(b) *Charges to be stated.* The settlement agent shall complete the HUD-1 or HUD-1A in accordance with the instructions set forth in appendix A to this part.

(c) *Aggregate accounting at settlement.* (1) After itemizing individual deposits in the 1000 series using single-item accounting, the servicer shall make an adjustment based on aggregate accounting. This adjustment equals the difference in the deposit required under aggregate accounting and the sum of the deposits required under single-item accounting. The computation steps for both accounting methods are set out in § 3500.17(d). The adjustment will always be a negative number or zero (-0-). The settlement agent shall enter the aggregate adjustment amount on a final line in the 1000 series of the HUD-1 or HUD-1A statement.

(2) During the phase-in period, as defined in § 3500.17(b), an alternative procedure is available. The settlement agent may initially calculate the 1000 series deposits for the HUD-1 and HUD-1A settlement statement using single-item analysis with only a one-month cushion (unless the mortgage loan documents indicate a smaller amount). In the escrow account analysis conducted within 45 days of settlement, however, the servicer shall adjust the escrow account to reflect the aggregate accounting balance. Appendix E to this part sets out examples of aggregate analysis. Appendix A to this part contains instructions for completing the HUD-1 or HUD-1A settlement statements using an aggregate analysis adjustment and the alternative process during the phase-in period.

24 C.F.R. § 3500.14 Prohibition against kickbacks and unearned fees.

(a) *Section 8 violation.* Any violation of this section is a violation of section 8 of RESPA (12 U.S.C. 2607) and is subject to enforcement as such under § 3500.19.

(b) *No referral fees.* No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in § 3500.14(g)(1). A company may not pay any other company or the employees of any other company for the referral of settlement service business.

(c) *No split of charges except for actual services performed.* No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

(d) *Thing of value.* This term is broadly defined in section 3(2) of RESPA (12 U.S.C. 2602(2)). It includes, without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation. The term "payment" is used throughout §§ 3500.14 and

3500.15 as synonymous with the giving or receiving any "thing of value" and does not require transfer of money.

(e) *Agreement or understanding.* An agreement or understanding for the referral of business incident to or part of a settlement service need not be written or verbalized but may be established by a practice, pattern or course of conduct. When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.

(f) *Referral.* (1) A referral includes any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business.

(2) A referral also occurs whenever a person paying for a settlement service or business incident thereto is required to use (see § 3500.2, "required use") a particular provider of a settlement service or business incident thereto.

(g) *Fees, salaries, compensation, or other payments.* (1) Section 8 of RESPA permits:

(i) A payment to an attorney at law for services actually rendered;

(ii) A payment by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;

(iii) A payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan;

(iv) A payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed;

(v) A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers. (The statutory exemption restated in this paragraph refers only to fee divisions within real estate brokerage arrangements when all parties are acting in a real estate brokerage capacity, and has no applicability to any fee arrangements between real estate brokers and mortgage brokers or between mortgage brokers.);

(vi) Normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto; or

(vii) An employer's payment to its own employees for any referral activities.

(2) The Department may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation. The value of a referral (i.e., the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services. The fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited.

(3) *Multiple services.* When a person in a position to refer settlement service business, such as an attorney, mortgage lender, real estate broker or agent, or developer or builder, receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary

and distinct from the primary services provided by such person. For example, for an attorney of the buyer or seller to receive compensation as a title agent, the attorney must perform core title agent services (for which liability arises) separate from attorney services, including the evaluation of the title search to determine the insurability of the title, the clearance of underwriting objections, the actual issuance of the policy or policies on behalf of the title insurance company, and, where customary, issuance of the title commitment, and the conducting of the title search and closing.

(h) *Recordkeeping.* Any documents provided pursuant to this section shall be retained for five (5) years from the date of execution.

(i) *Appendix B of this part.* Illustrations in appendix B of this part demonstrate some of the requirements of this section.

EFFECTIVE DATE NOTE: At 61 FR 29252, June 7, 1996, § 3500.14 was amended by revising the last sentence of paragraph (b), the heading of paragraph (g), and paragraph (g)(1), effective Oct. 7, 1996. At 61 FR 51782, Oct. 4, 1996, the effective date was delayed until further notice. For the convenience of the user, the new text is set forth as follows:

§ 3500.14 Prohibition against kickbacks and unearned fees.

* * * * *

(b) * * * A business entity (whether or not in an affiliate relationship) may not pay any other business entity or the employees of any other business entity for the referral of settlement service business.

* * * * *

(g) *Exemptions for fees, salaries, compensation, or other payments.* (1) The following are permissible:

(i) A payment to an attorney at law for services actually rendered;

(ii) A payment by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;

(iii) A payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan;

(iv) A payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed;

(v) A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers. (The statutory exemption restated in this paragraph refers only to fee divisions within real estate brokerage arrangements when all parties are acting in a real estate brokerage capacity, and has no applicability to any fee arrangements between real estate brokers and mortgage brokers or between mortgage brokers.)

(vi) Normal promotional and educational activities that are not conditioned on the referral of business and do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto;

(vii) A payment by an employer to its own *bona fide* employee for generating business for that employer;

(viii) In a controlled business arrangement, a payment by an employer of a bonus to a managerial employee based on criteria relating to performance (such as profitability, capture rate, or other thresholds) of a business entity in the controlled business arrangement. However, the amount of such bonus may not be calculated as a multiple of the number or value of referrals of settlement service business to a business entity in a controlled business arrangement; and

(ix)(A) A payment by an employer to its *bona fide* employee for the referral of settlement service business to a settlement service provider that has an affiliate relationship with the employer or in which the employer has a direct or beneficial ownership interest of more than 1 percent, if the following conditions are met:

(1) The employee does not perform settlement services in any transaction; and

(2) Before the referral, the employee provides to the person being referred a written disclosure in the format of the Controlled Business Arrangement Disclosure Statement, set forth in appendix D to this part.

(B) For purposes of this paragraph (g)(1)(ix), the marketing of a settlement service or product of an affiliated entity, including the collection and conveyance of information or the taking of an application or order for an affiliated entity, does not constitute the performance of a settlement service. Under this paragraph (g)(1)(ix), marketing of a settlement service or product may include incidental communications with the consumer after the application or order, such as providing the consumer with information about the status of an application or order; marketing shall not include serving as the ongoing point of contact for coordinating the delivery and provision of settlement services.

* * * * *

24 C.F.R. § 3500.19 Enforcement.

(a) *Enforcement policy.* It is the policy of the Secretary regarding RESPA enforcement matters to cooperate with Federal, State or local agencies having supervisory powers over lenders or other persons with responsibilities under RESPA. Federal agencies with supervisory powers over lenders may use their powers to require compliance with RESPA. In addition, failure to comply with RESPA may be grounds for administrative action by the Secretary under part 24 of this title concerning debarment, suspension, ineligibility of contractors and grantees, or under part 25 of this title concerning the HUD Mortgagee Review Board. Nothing in this paragraph is a limitation on any other form of enforcement which may be legally available.

(b) *Violations of section 8 of RESPA (12 U.S.C. 2607), § 3500.14, or § 3500.15.* Any person who violates §§ 3500.14 or 3500.15 shall be deemed to violate section 8 of RESPA and shall be sanctioned accordingly.

(c) *Violations of section 9 of RESPA (12 U.S.C. 2608) or § 3500.16.* Any person who violates section 3500.16 of

this part shall be deemed to violate section 9 of RESPA and shall be sanctioned accordingly.

(d) *Investigations.* The procedures for investigations and investigational proceedings are set forth in 24 CFR part 3800.

Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 23 provides:

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available meth-

ods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to

whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if

application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

APPENDIX I

30 YEAR FIXED CODE 0100

	10 Day	30 Day
7.625	-3.000	-2.875
7.500	-2.625	-2.500
7.375	-2.125	-2.000
7.250	-1.875	-1.750
7.125	-1.375	-1.250
7.000	-0.875	-0.750
6.875	-0.250	-0.125
6.750	0.250	0.375
6.625	0.875	1.000
6.500	1.375	1.500

Call for 45 and 60 day prices
Add 1.500 to disc. for investments.
Use Same pricing structure for CHBP.

20 YEAR FIXED CODE 0102

	10 Day	30 Day
7.625	-2.750	-2.625
7.500	-2.500	-2.375
7.375	-2.375	-2.250
7.250	-2.125	-2.000
7.125	-1.750	-1.625
7.000	-1.250	-1.125
6.875	-0.750	-0.625
6.750	-0.250	-0.125
6.625	0.250	0.375
6.500	0.750	0.875
6.375	1.250	1.375

15 YEAR FIXED CODE 0104

	10 Day	30 Day
7.250	-2.250	-2.250
7.125	-1.750	-1.750
7.000	-1.500	-1.500
6.875	-1.125	-1.125
6.750	-0.750	-0.750
6.625	-0.250	-0.250
6.500	0.125	0.125
6.375	0.625	0.625
6.250	1.000	1.000
6.125	1.500	2.375
6.000	2.000	2.000

80% Cash Out Refis now Available - Call for Details
Add .25 for C/O refi 75.01 - 80%

10 YEAR FIXED CODE 0106

	10 Day	30 Day
7.375	-2.625	-2.500
7.250	-2.600	-2.376
7.125	-2.000	-1.876
7.000	-1.750	-1.625
6.875	-1.375	-1.250
6.750	-1.000	-0.875
6.625	-0.500	-0.375
6.500	-0.125	0.000
6.375	0.375	0.500
6.250	0.750	0.875
6.125	1.250	1.375

Max loan $240,000

CODE J1450

	10 Day	30 Day
7.750	-2.375	-2.250
7.625	-2.000	-1.875
7.500	-1.625	-1.500
7.375	-1.375	-1.250
7.250	-1.000	-0.875
7.125	-0.600	-0.375
7.000	0.000	0.125

CODE J1451

	10 Day	30 Day
7.375	-2.125	-2.000
7.250	-1.876	-1.750
7.125	-1.500	-1.375
7.000	-1.125	-1.000
6.875	-0.875	-0.750
6.750	-0.500	-0.376
6.625	-0.125	0.000

$650,001 and up add .25 to rate. Call for 60 day quotes

O/Occ/Purchase LTVs	NIV available - 70%LTV = .25 to discount
95% LTV to $300K	Add .50 to discount for LTV's > 90%
90% LTV to $500K	Add $150 investor fee on 1450/1451
80% LTV to $650K	90% LTV to $500K (O/Occ/2-4 units/Pur)
70% LTV to $750K	Call for Refinance/2nd Home LTV Limits
60% LTV to $1MIL	See product profile for complete guidelines

RATES SUBJECT TO CHANGE WITHOUT NOTICE
ALL PRICES QUOTED ARE NET PRICES
LOCKS ACCEPTED FROM APPROX. 10:30 AM TO 5:30PM E THE SAME BUSINESS DAY

Escrow Waiver fee: Lesser of $500 or 0.26 disc.
LTV must be 80% or below

1 YR ARM CONFORMING
Code 0200
Caps: 2/6 Margin: 3.00

	10 Day	30 Day
6.125	-1.500	-1.375
6.000	-1.375	-1.250
5.875	-1.250	-1.125
5.750	-1.125	-1.000
5.625	-1.000	-0.875
5.500	-0.875	-0.750
5.375	-0.750	-0.625
5.250	-0.600	-0.375
5.125	-0.250	-0.125

Max LTV 95% (o/o purchase)
Add .50 to discount for LTV's > 90

ONE YEAR ARM JUMBO
Code 0650
Caps: 2/6 Margin: 2.75

	10 Day	30 Day
7.750	-0.750	-0.625
7.600	-0.625	-0.500
7.375	-0.375	-0.250
7.250	-0.250	-0.125
7.125	0.000	0.125
7.000	0.125	0.250
6.875	0.375	0.500
6.750	0.500	0.625

Max LTV 90% (O/O/Purchase)
See ARM Product box for general guidelines

3/1 YR ARM CONF/JUMBO
Code 652
Caps: 2/6 Margin: 2.75

	10 Day	30 Day
6.750	-0.875	-0.750
6.625	-0.625	-0.500
6.500	-0.375	-0.250
6.375	-0.125	0.000
6.250	0.125	0.250
6.125	0.250	0.375
6.000	0.500	0.625

95% NO CASH OUT REFI ALLOWED!!
Add .750 to discount for LTV's > 80
CALL FOR QUOTES OVER 650K

10/1 YR ARM CONF/JUMBO
Code 658
Caps: 5/2/5 Margin: 2.75

	10 Day	30 Day
7.375	-0.875	-0.750
7.250	-0.750	-0.625
7.125	-0.625	-0.500
7.000	0.000	0.125
6.875	0.375	0.500
6.750	0.875	1.000

5/1 Arm (0654) Available - Call

ARM PRODUCT GUIDELINES
PRODUCTS 0652, 0654, 0656 & 0658
JUMBO NIV UP TO 70% - MAX $650,000 - Add .25 to discount
LTV limits for Purchases/Rate Term Refi's

Primary Residence	Second Home (SFH only)
95% LTV TO $300,000	90% LTV TO $400,000
90% LTV TO $600,000	80% LTV TO $500,000
80% LTV TO $650,000	O/Occ 2-4 Family
70% LTV TO $750,000	90% LTV TO $500,000
60% LTV TO $1,000,000	

LTV LIMITS FOR CASH OUT REFI'S

75% LTV TO $650,000	(Max. $100,000 cash out)
60% LTV TO $650,000	(Max. $150,000 cash out)

NO CASH OUT AVAIL. ON SECOND HOMES.
INVESTMENT PROPERTIES INELIGIBLE
ADD 24 HOURS TO UNDERWRITING
Add $150 underwriting for all NIV.

2-1 BUYDOWN 30 YEAR
Code 0100-BD
Rate quoted is 2-1 start rate

	10 Day	30 Day
5.750	-0.500	-0.376
5.625	-0.125	0.000
5.500	0.250	0.375
5.375	0.750	0.876
5.250	1.000	1.125
5.125	1.500	1.625
5.000	2.000	2.125
4.875	2.625	2.750
4.750	3.125	3.250

See Pricing policy below 50K
See product manual for guidelines
95% LTV - $240,000 - Max Loan

5/25 BALLOON CODE 0410
Max loan 240,000 Max LTV 80%

	10 Day	30 Day
7.250	-1.625	-1.625
7.125	-1.500	-1.500
7.000	-1.375	-1.375
6.875	-1.250	-1.250

Cash Out Refi to 65%

7/23 BALLOON CODE 0112
Max loan 240,000 Max LTV 90%

	10 Day	30 Day
7.250	-1.500	-1.500
7.125	-1.376	-1.376
7.000	-1.250	-1.250
6.875	-1.125	-1.125
6.750	-0.875	-0.875

Cash out refi to 70%

DU FLEX 97 30 YEAR
Code 0130

	10 Day	30 Day
8.000	-2.250	-2.250
7.875	-2.125	-2.125
7.750	-1.750	-1.750
7.625	-1.375	-1.375
7.500	-1.000	-1.000
7.375	-0.500	-0.500
7.250	-0.250	-0.250
7.125	0.250	0.250
7.000	0.750	0.750

650 Minimum Score
Owner Occupied
Primary Residence Only

PRICING POLICY

Loan Amount	Discount
under 50K	0.5

Applicable to ALL loan programs

LOCK-IN OPTIONS
All loans must fund by rate lock expiration.
10 Day Rate Lock
Available for Purchases and Refi's. Loans must be received in underwriting in our Charlotte office.
30 Day Rate Lock
Available for Purchases & Refi's
45 Day Rate Lock
Available for Purchases only

CONTACT INFORMATION

Rates Effective: 03/26/99
REFI'S MUST BE APPROVED FOR 10 DAY PRICING
Expiration Dates: 10 Day 04/05/99
30 Day 04/25/99
60 Day 05/25/99

JOHN CARROLL -Central & W. NC AND E.TENN REP.	Pager/VM	800 503-0251
MIKE HODGES - SC, RALEIGH& E. NC ACCOUNT REP	Pager	800-420-3015
LINDA GRECO - GA ACCOUNT REP.	Pager	888-223-5201
SHARON KESSENICH - GA ACCOUNT REP.	Pager	770-475-1152
JIMMY DENTON - GA ACCOUNT REP	Pager	770-428-4340

REGISTRATIONS: Terri X239 Lisa X234
Underwriting Time = 24 - 36 Hours
Phone: 1-800-260-6207 or 704-541-8586
Registration Fax 704-541-1712
Underwriting Fax 704-541-8797
Closing Fax 704-541-8595

First Union Mortgage Corp.
7422 Carmel Executive Park, Suite 308
Charlotte, NC 28226
(704) 541-8566 (800) 260-6207
Registration Fax: (704) 541-1712
Joe Simonoko, Regional VP of Sales

FAX ON DEMAND 1-888 865-2293

OVERNIGHT PROTECTION AVAILABLE VIA FAX UNTIL 7:00AM ON ALL NEWLY TAKEN APPS THAT NIGHT. Please fax now (1003)

Overnight Protection Available Via Fax For New Purchase Apps Taken That Night Until 7:00 AM - Must fax 1003. REFIS MUST BE LOCKED BY 5:00 PM TODAY.

Improve Price By .125% On Purchases ALL PROGRAMS AND/OR Improve Price By .125% Discount For Loans Over $120,000 (0100, 0102, 0104 and 0106)

Visit our new web site today at http://www.lioninc.com/firstunion

Rev. 03/26/99

BEST AVAILABLE COPY

HUD-1 UNIFORM SETTLEMENT STATEMENT

EASY SOFT, Inc. C

A. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT — SETTLEMENT STATEMENT

B. TYPE OF LOAN: 1. FHA 2. FmHA 3. CONV. UNINS. 4. VA 5. CONV. INS

6. File Number: Heimmermann — 7. Loan Number: 8080480-CO

8. Mortgage Insurance Case Number

C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.
NOTE: TIN = Taxpayer's Identification Number

D. NAME AND ADDRESS OF BORROWER:	E. NAME, ADDRESS, AND TIN OF SELLER:	F. NAME AND ADDRESS OF LENDER
Daniel J. Heimmermann Emily P. Heimmermann	James H. Sandlin, Jr. Tammy D. Sandlin	First Union Mtg. Corp. 4101 McEwen Rd Ste. 100 Farmers Branch TX 75244

G. PROPERTY LOCATION:	H. SETTLEMENT AGENT NAME, ADDRESS AND TIN	
128 Royal Oak Florence, AL 35630 OAK HILL SUBDIVISION LOT 5 BLOCK 17	Jimmy Sandlin PLACE OF SETTLEMENT 225 W. Alabama Street Florence, AL 35630	I. SETTLEMENT DATE 12/12/97

J. SUMMARY OF BORROWER'S TRANSACTION		K. SUMMARY OF SELLER'S TRANSACTION	
100. GROSS AMOUNT DUE FROM BORROWER:		400. GROSS AMOUNT DUE TO SELLER:	
101. Contract sales price	173,000.00	401. Contract sales price	173,000.00
102. Personal property		402. Personal property	
103. Settlement charges to borrower (Line 1400)	1,826.22	403.	
104.		404.	
105.		405.	
Adjustments for items paid by seller in advance		Adjustments for items paid by seller in advance	
106. City/town taxes to		406. City/town taxes to	
107. County taxes to		407. County taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. GROSS AMOUNT DUE FROM BORROWER	174,826.22	420. GROSS AMOUNT DUE TO SELLER	173,000.00

200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER:		500. REDUCTIONS IN AMOUNT DUE TO SELLER:	
201. Deposit or earnest money	1,000.00	501. Excess deposit	
202. Principal amount of new loan(s)	164,300.00	502. Settlement charges to seller (Line 1400)	6,240.95
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204		504. Payoff of first mortgage loan BANK IND.	150,137.44
205.		505. Payoff of second mortgage loan	
206.		506. 1997 Property Taxes	785.53
207.		507.	
208.		508.	
209.		509.	
Adjustments for items unpaid by seller		Adjustments for items unpaid by seller	
210. City/town taxes to		510. City/town taxes to	
211. County taxes 10-01 to 12-12	156.24	511. County taxes 10-01 to 12-12	156.24
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. TOTAL PAID BY/FOR BORROWER	165,456.24	520. TOTAL REDUCTION AMOUNT DUE SELLER	157,320.16

300. CASH SETTLEMENT FROM/TO BORROWER		600. CASH AT SETTLEMENT FROM/TO SELLER	
301. Gross amount due from borrower (Line 120)	174,826.22	601. Gross amount due to seller (Line 420)	173,000.00
302. Less amount paid by/for borrower (Line 220)	165,456.24	602. Less reduction in amount due seller (Line 520)	157,320.16
303. CASH [X] FROM/ [ ] TO BORROWER	9,369.98	603. CASH [X] TO/ [ ] FROM SELLER	15,679.84

SUBSTITUTE FORM 1099 SELLER STATEMENT

The information contained in Blocks E, G, H, and I and on line 401 (or, if line 401 is asterisked, line 403 and 404) is important tax information and is being furnished to the Internal Revenue Service. If you are required to file a return, a negligence penalty or other sanction will be imposed on you if this item is required to be reported and the IRS determines that it has not been reported. If this real estate is your principal residence, file Form 2119, Sale or Exchange of Principal Residence, for any gain, with your income tax return; for other transactions, complete the applicable parts of Form 4797, Form 6252 and/or Schedule D (Form 1040). You are required to provide the Settlement Agent (named above) with your correct taxpayer identification number. If you do not provide the Settlement Agent with your correct taxpayer identification number, you may be subject to civil or criminal penalties imposed by law. Under penalties of perjury, I certify that the number shown on this statement is my correct taxpayer identification number.

(Seller's Signature) James H. Sandlin, Jr.

L. SETTLEMENT CHARGES		EASY SOFT, Inc. (C)
		PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
700. TOTAL SALES/BROKER'S COMMISSION based on price $173,000.00 @ 2.000 %			
Division of Commission (line 700) as follows:			
701. $ 3,460.00 to Prudential Clement Realty			
702. $ to			
703. Commission paid at Settlement			3,460.00
704.			
800. ITEMS PAYABLE IN CONNECTION WITH LOAN			
801. Loan Origination Fee 1 % TVF			1,643.00
802. Loan Discount 0 %			
803. Appraisal Fee to POC ($275.00) to TVF			
804. Credit Report to $55.00 POC ($20.00) to TVF			35.00
805. Lender's Inspection Fee Express Mail to TVF			35.00
806. Mortgage Insurance Application Fee to Processing Fee to TVF			100.00
807. Assumption Fee Express Mail Fee to FUMC			8.00
808. Tax Service Fee to FUMC			74.00
809. Documentation Handling Fee to FUMC			75.00
810. Underwriting Fee to FUMC			210.00
811. Yield Spd. Pre. to TVF thru FUMC, POC ($1232.25)			
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE			
901. Interest from 12/12/97 to 12/31/97 @ 32.630 /day		652.60	
902. Mortgage Insurance Premium for months to			
903. Hazard Insurance Premium for 1 years to Tom Jones Ins.		682.00	
904. years to			
905.			
1000. RESERVES DEPOSITED WITH LENDER			
1001. Hazard Insurance 3 months @ $ 56.830 per month		170.49	
1002. Mortgage Insurance 1 months @ $ 106.800 per month		106.80	
1003. City property taxes months @ $ per month			
1004. County property taxes 3 months @ $ 65.460 per month		196.38	
1005. Annual assessments months @ $ per month			
1006. Flood Cert Fee months @ $ per month		18.00	
1007. Aggregate months @ $ per month		-0.05	
1008. Aggregate Accounting Adjustment			
1100. TITLE CHARGES			
1101. Settlement or closing fee to			
1102. Abstract or title search to			
1103. Title Examination to			
1104. Title insurance binder to			
1105. Document preparation to			
1106. Notary fees to			
1107. Attorney's fees to Schuessler & Sandlin POC ($350.00)			
(includes above item numbers:)			
1108. Title Insurance to The Abstract Co.			225.00
(includes above item numbers:)			
1109. Lender's coverage			
1110. Owner's coverage			
1111.			
1112.			
1113.			
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES			
1201. Recording fees: Deed $ 16.00 Mortgage $ 26.00 Release $ 8.50			50.50
1202. City/cnty tax stmps: Deed $ 9.00 Mortgage $ 246.45			255.45
1203. State tax stamps: Deed $ Mortgage $			
1204.			
1205.			
1300. ADDITIONAL SETTLEMENT CHARGES			
1301. Survey to			
1302. Pest inspection to A&E Southern Services			50.00
1303. Air Mail Fee to S&S			20.00
1304.			
1305.			
1306.			
1307.			
1308.			
1400. TOTAL SETTLEMENT CHARGES (enter on lines 103, Section J and 502, Section K)		1,826.22	6,240.95

CERTIFICATION

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

James H. Sandlin, Jr. — Seller

Tammy D. Sandlin — Seller

Daniel J. Heimmermann — Borrower

Emily P. Heimmermann — Borrower

To the best of my knowledge the HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds which were received and have been or will be disbursed by the undersigned as part of the settlement of this transaction.

Jimmy Sandlin — Settlement Agent

12/12/97 — Date

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.

Bank herica

BankAmerica tage

A Division of Bank of, & FSB

WHOLESALE LENDING DIVISION

ALL RATES AND POINTS ARE SUBJECT TO CHANGE AT ANY TIME

Effective Date and Time: 11:00 am May 29, 1996

FIXED AND BALLOON

FLOATING AND REFINANCES MUST BE LOCKED IN BY 5:00 PM May 29, 1996

PURCHASES MUST BE LOCKED IN BY 9:00 AM May 30, 1996

NEW! JUMBO FIXED RATE PRICING - WITH PREPAY OPTION! SEE PAGE 3.

NEW! START RITE ARM - LOW RATES!

30YR BMF30A

30 YR FIXED CONFORMING

RATE	15 DAY	30 DAY	45 DAY	60 DAY
7.250	4.000	4.125	4.250	4.375
7.375	3.250	3.375	3.500	3.625
7.500	2.500	2.625	2.750	2.875
7.625	1.875	2.000	2.125	2.250
7.750	1.500	1.625	1.750	1.875
7.875	0.875	1.000	1.125	1.250
8.000	0.125	0.250	0.375	0.500
8.125	-0.375	-0.250	-0.125	0.000
8.250	-0.750	-0.625	-0.500	-0.375
8.375	-1.375	-1.250	-1.125	-1.000
8.500	-1.875	-1.750	-1.625	-1.500
8.625	-2.375	-2.250	-2.125	-2.000
8.750	-2.750	-2.625	-2.500	-2.375
8.875	N/A	N/A	-3.000	-2.875
9.000	N/A	N/A	N/A	-3.000

* 95% LTV Own Occ Purch; 90% LTV 2nd Home
* 75% LTV; Invst Purch 1 family (add 1.50 pts)
* For 2-1 lender funded buydown add 2.625 pts
* FNMA 97% at same price
* 60/10/10; PMI required

15YR BMF15A

15 YR FIXED CONFORMING

RATE	15 DAY	30 DAY	45 DAY	60 DAY
8.875	2.625	2.750	2.875	3.000
7.000	2.125	2.250	2.375	2.500
7.125	1.500	1.625	1.750	1.875
7.250	1.250	1.375	1.500	1.625
7.375	0.625	0.750	0.875	1.000
7.500	0.125	0.250	0.375	0.500
7.625	-0.375	-0.250	-0.125	0.000
7.750	-0.625	-0.500	-0.375	-0.250
7.875	-1.250	-1.125	-1.000	-0.875
8.000	-1.625	-1.500	-1.375	-1.250
8.125	-2.125	-2.000	-1.875	-1.750
8.250	-2.375	-2.250	-2.125	-2.000
8.375	-2.750	-2.625	-2.500	-2.375
8.500	N/A	-3.000	-2.875	-2.750
8.625	N/A	N/A	N/A	-3.000

* 95% LTV Own Occ Purch; 90% LTV 2nd Home
* 75% LTV; Invst Purch 1 family (add 1.50 pts)
* For 2-1 lender funded buydown add 2.625 pts
* Extended locks available (See Notes)
* 60/10/10; PMI required

BA723 BMF07A

7 YEAR BALLOON Conforming

RATE	15 DAY	30 DAY	45 DAY	60 DAY
8.875	1.375	1.500	1.625	1.750
7.000	0.875	1.000	1.125	1.250
7.125	0.375	0.500	0.625	0.750
7.250	0.125	0.250	0.375	0.500
7.375	-0.125	0.000	0.125	0.250
7.500	-0.500	-0.375	-0.250	-0.125
7.625	-1.000	-0.875	-0.750	-0.625
7.750	-1.250	-1.125	-1.000	-0.875
7.875	-1.500	-1.375	-1.250	-1.125
8.000	-1.875	-1.750	-1.625	-1.500
8.125	-2.375	-2.250	-2.125	-2.000
8.250	-2.625	-2.500	-2.375	-2.250
8.375	-3.000	-2.875	-2.750	-2.625
8.500	N/A	N/A	N/A	-3.000
8.625	N/A	N/A	N/A	-3.000

* 7 Year Balloon with contl optn to extend to 23 yrs
* 80% LTV max o/o; 70% LTV max, o/o o/c not
* 2nd home purchase 80% LTV max
* 60/10/10; PMI required
* No investor properties allowed
* For 2-1 lender funded buydown add 2.625 pts

525 FCF05A

5 YEAR BALLOON Conforming

RATE	15 DAY	30 DAY	45 DAY	60 DAY
8.500	1.625	1.750	1.875	2.000
8.625	1.250	1.375	1.500	1.625
8.750	0.875	1.000	1.125	1.250
8.875	0.500	0.625	0.750	0.875
7.000	0.125	0.250	0.375	0.500
7.125	-0.125	0.000	0.125	0.250
7.250	-0.500	-0.375	-0.250	-0.125
7.375	-0.750	-0.625	-0.500	-0.375
7.500	-1.000	-0.875	-0.750	-0.625
7.625	-1.250	-1.125	-1.000	-0.875
7.750	-1.500	-1.375	-1.250	-1.125
7.875	-1.750	-1.625	-1.500	-1.375
8.000	-2.000	-1.875	-1.750	-1.625
8.125	-2.250	-2.125	-2.000	-1.875
8.250	-2.375	-2.250	-2.125	-2.000

* Occ Type : Primary and Second Homes
* No Investment Property
* Second home, rate-term to 70%
* 5 Year Balloon reconstZonal opt extend to 25 yrs
* No subordinate financing
* 80% LTV maximum (purchase)

SAF30A

30 YR FIXED JUMBO

RATE	15 DAY	30 DAY	45 DAY	60 DAY
8.000	2.125	2.125	2.250	2.375
8.125	1.500	1.500	1.625	1.750
8.250	1.250	1.250	1.375	1.500
8.375	0.625	0.625	0.750	0.875
8.500	0.125	0.125	0.250	0.375
8.625	-0.250	-0.250	-0.125	0.000
8.750	-0.750	-0.750	-0.625	-0.500
8.875	-1.250	-1.250	-1.125	-1.000
9.000	N/A	N/A	N/A	-1.500
9.125	N/A	N/A	N/A	N/A

* 90% LTV O/O Purch; 80% LTV 2nd Home + 0.5 pt
* $207,250 to $650,000 (over $450,000 add 0.5 pts)
* No investor property
* Cash out to $100,000 @ 75% LTV add 0.5 pts
* 60/10/10; No PMI

SAF15A

15 YR FIXED JUMBO

RATE	15 DAY	30 DAY	45 DAY	60 DAY
7.625	1.875	1.875	2.000	2.125
7.750	1.375	1.375	1.500	1.625
7.875	1.000	1.000	1.125	1.250
8.000	0.500	0.500	0.625	0.750
8.125	-0.250	-0.250	-0.375	0.500
8.250	-0.500	-0.500	-0.375	-0.250
8.375	-0.875	-0.875	-0.750	-0.625
8.500	-1.375	-1.375	-1.250	-1.125
8.625	N/A	N/A	-1.500	-1.375
8.750	N/A	N/A	N/A	N/A

* 80% LTV O/O Purch; 80% LTV 2nd Home + 0.5 pt
* $207,050 to $650,000 (over $650,000 add 0.5 pts)
* No investor property
* Cash out to $100,000 @ 75% LTV add 0.5 pts
* minimum loan size

General Information for FIXED AND BALLOON PROGRAMS :

* Extended Locks for BMF30A, BMF15A, BMF07A & FCF05A, add to 60 day price : 90 day + .250; 120 day +.50; 180 day + 1.00; 270 day +1.750
  (.50 pt collected upfront for 90/120 day locks; 1.00 pt collected upfront for 180/270 day locks , refundable at closing)
* Add 0.25 pt. to price for New York brokered loans.
* Waiver of tax/insurance escrows Max LTV is 80%; add .375 to px.(Except New York properties) Not available on Investment Properties
* 7/23 buydown purchase add 2.625 to 7/25 pts, start rate 2% below note rate
* Please see Program Matrix or Fact Sheet for details; Off sheet pricing available, call for quotes.
* For All Investment properties add 1.5 pts.
*
*

15 Day Expr.	30 Day Expr.	45 Day Expr.	60 Day Expr.	90 Day Expr.	120 Day Expr.	180 Day Expr.	270 Day Expr
6/12/96	6/27/96	7/12/96	7/29/96	8/26/96	9/25/96	11/25/96	2/24/97

This document is intended for and is to be used for information purposes only; it is intended for Loan Agents, Brokers, and similar entities and is not intended for nor should it be provided to the general public

New England Wholesale Glastonbury, CT

Phone 800-654-5518 Registration Fax 203-633-6341

SALE LENDING DIVISION
ALL RATE[illegible] ARE SUBJECT TO CHANGE AT ANY TIME

America Mortgage — A Division of Bank of America, FSB

NONCONFORMING

Effective Date/Time: 11:00 am May 29, 1996

FLOATING REFINANCES MUST BE LOCKED IN BY 5:00 PM May 29, 1996

PURCHASE MUST BE LOCKED IN BY 9:00 AM May 30, 1996

3/1 SAF31A
3/1 ARM

RATE	30 DAY	90 DAY	120	180
6.750	2.000	2.250	2.750	3.250
6.875	1.500	1.750	2.250	2.750
7.000	1.000	1.250	1.750	2.250
7.125	0.500	0.750	1.250	1.750
7.250	0.000	0.250	0.750	1.250
7.375	-0.250	0.000	0.500	1.000
7.500	-0.500	-0.250	0.250	0.750
7.625	-0.750	-0.500	0.000	0.500
7.750	-1.000	-0.750	-0.250	0.250
7.875	N/A	N/A	N/A	N/A

* Adminstrd Life Cap 11.875, Mgn 2.75, Idx6.5MO
* First adj. cap 2.00%; subsequent adj. caps 2.00%
* 2nd homes + 0.5 pt.; Investor .50 to rate, .25 to fee
* 80% LTV for Own Occ Purch to $300,000
* No cash out for investor/second home
* Qualify at the fully indexed rate

5/1 SAF51A
5/1 ARM

RATE	30 DAY	90 DAY	120	180
7.125	2.500	2.750	3.250	3.750
7.250	1.875	2.125	2.625	3.125
7.375	1.250	1.500	2.000	2.500
7.500	0.625	0.875	1.375	1.875
7.625	0.000	0.250	0.750	1.250
7.750	-0.375	-0.125	0.375	0.875
7.875	-0.750	-0.500	0.000	0.500
8.000	-1.125	-0.875	-0.375	0.125
8.125	-1.500	-1.250	-0.750	-0.250
8.250	N/A	N/A	N/A	N/A

* Adminstrd Life Cap 11.875, Mgn 2.75, Idx6.5MO
* First adj. cap 5.00%; subsequent adj. caps 2.00%
* 2nd homes + 0.5 pt.; Investor .50 to rate, .25 to fee
* 80% LTV for Own Occ Purch to $300,000
* No cash out for investor/second home
* Qualify at start rate.

7/1 SAF71A
7/1 ARM

RATE	30 DAY	90 DAY	120	180
7.375	3.000	3.250	3.750	4.250
7.500	2.250	2.500	3.000	3.500
7.625	1.500	1.750	2.250	2.750
7.750	0.750	1.000	1.500	2.000
7.875	0.000	0.250	0.750	1.250
8.000	-0.375	-0.125	0.375	0.875
8.125	-0.750	-0.500	0.000	0.500
8.250	-1.125	-0.875	-0.375	0.125
8.375	-1.500	-1.250	-0.750	-0.250
8.500	N/A	N/A	N/A	N/A

* Adminstrd Life Cap 11.875, Mgn 2.75, Idx6.5MO
* First adj. cap 5.00%; subsequent adj. caps 2.00%
* 2nd homes + 0.5 pt.; Investor .50 to rate, .25 to fee
* 80% LTV for Own Occ Purch to $300,000
* No cash out for investor/second home
Qualify at start rate.

10/1 SAV10A
10/1 JUMBO ARM

RATE	30 DAY	90 DAY	120	180
7.375	3.375	3.625	4.125	4.625
7.500	2.625	2.875	3.375	3.875
7.625	1.875	2.125	2.625	3.125
7.750	1.125	1.375	1.875	2.375
7.875	0.375	0.625	1.125	1.625
8.000	0.000	0.250	0.750	1.250
8.125	-0.375	-0.125	0.375	0.875
8.250	-0.500	-0.250	0.250	0.750
8.375	N/A	N/A	N/A	N/A
8.500	N/A	N/A	N/A	N/A

* Ceiling = start rate + 6%, Mgn 2.75, Idx 6.5MO
* No Prepayment Penalty / Convertible option avail.
* 95% LTV for Own Occ Purch (no add-on)
* Max reserves is 1,000 / Min loan amount $207,201.
* 2nd homes add 0.5 pt. / No investment property
* Call for quotes on other options.

10/1 SAV10A
10/1 Conforming ARM

RATE	30 DAY	90 DAY	120	180
7.500	3.125	3.375	3.875	4.375
7.625	2.375	2.625	3.125	3.625
7.750	1.625	1.875	2.375	2.875
7.875	0.875	1.125	1.625	2.125
8.000	0.125	0.375	0.875	1.375
8.125	-0.250	0.000	0.500	1.000
8.250	-0.625	-0.375	0.125	0.625
8.375	-1.000	-0.750	-0.250	0.250
8.500	N/A	N/A	N/A	N/A
8.625	N/A	N/A	N/A	N/A

* Ceiling = start rate + 6%, Mgn 2.75, Idx 5.5MO
* No Prepayment Penalty / Convertible option avail.
* 95% LTV for Own Occ Purch (No add-on)
* Max reserves is 1,000 / Min loan amount $207,201.
* 2nd homes add 0.5 pt. / No investment property
* Call for quotes on other options

SPOT SANCSA
1 YEAR SPOT ARM

RATE	30 DAY	90 DAY	120	180
6.000	-0.375	-0.125	0.375	0.750
6.125	-0.500	-0.250	0.250	0.625
6.250	-0.625	-0.375	0.125	0.500
6.375	-0.750	-0.500	0.000	0.375
6.500	-0.875	-0.625	-0.125	0.250
6.625	-1.000	-0.750	-0.250	0.125
6.750	-1.125	-0.875	-0.375	0.000
6.875	-1.250	-1.000	-0.500	-0.125
7.000	-1.375	-1.125	-0.625	-0.250
7.125	-1.500	-1.250	-0.750	-0.375

* Adminstrd Life Cap 11.875, Mgn 2.75, Idx 5.5MO
* 2nd Home add 0.50 pts; Investor prop add 1.0 pt
* Extended locks available/Funding notes
* Loan amounts to $2,000,000
* 90% LTV to $300,000 / no conversion
* For Convertible; add 0.25% rate (use SAVCIA)

6MO SANCSA
6 MONTH TREASURY AVERAGE ARM

RATE	30 DAY	90 DAY	120	180
5.875	-0.375	-0.125	0.375	0.750
6.000	-0.500	-0.250	0.250	0.625
6.125	-0.625	-0.375	0.125	0.500
6.250	-0.750	-0.500	0.000	0.375
6.375	-0.875	-0.625	-0.125	0.250
6.500	-1.000	-0.750	-0.250	0.125
6.625	-1.125	-0.875	-0.375	0.000
6.750	-1.250	-1.000	-0.500	-0.125
6.875	-1.375	-1.125	-0.625	-0.250
7.000	-1.500	-1.250	-0.750	-0.375

* Adminstrd Life Cap 11.875, Mgn 2.875, Idx 6.467
* 2nd Home add 0.50 pts; Investor prop add 1.0 pt
* Extended locks available/Funding notes
* Loan amounts to $2,000,000
* 90% LTV to $300,000 / no conversion
* For Convertible; add 0.25% rate (use SAVCIA)

1YR SANCIA
1 YEAR TREASURY AVERAGE ARM

RATE	30 DAY	90 DAY	120	180
5.875	-0.375	-0.125	0.375	0.750
6.000	-0.500	-0.250	0.250	0.625
6.125	-0.625	-0.375	0.125	0.500
6.250	-0.750	-0.500	0.000	0.375
6.375	-0.875	-0.625	-0.125	0.250
6.500	-1.000	-0.750	-0.250	0.125
6.625	-1.125	-0.875	-0.375	0.000
6.750	-1.250	-1.000	-0.500	-0.125
6.875	-1.375	-1.125	-0.625	-0.250
7.000	-1.500	-1.250	-0.750	-0.375

* Adminstrd Life Cap 11.875, Mgn 2.875, Idx 6.467
* 2nd Home add 0.50 pts; Investor prop add 1.0 pt
* Extended locks available/Funding notes
* Loan amounts to $2,000,000
* 90% LTV to $300,000 / no conversion
* For Convertible; add 0.25% rate (use SAVCIA)

General information for ARM PROGRAMS :

* Extended Locks for SAVL6K, SAVC6A, SANC6A & SAV61E (add to 60 day price): 90 day = .250; 120 day = .75; 180 day = 1.125; 270 day =1.35 (extended up front, refundable at closing)
* Extended Locks for SAF30A (add to 60 day price): 90 day = .250; 120 day = .75; 180 day = 1.25; 270 day =1.5 (extended up front, refundable at closing)
* Add 0.25 pt. to price for New York brokered loans. * For All investment properties add 1.0 pts.
* Waiver of inadvertent overage Max LTV to 80%; add .375 to pts(Except New York properties) Not available on Investment Properties
*
* For SA products when investment properties are allowed, add 1.0 pt.
* Please see Program Matrix or Fact Sheet for details; Off sheet pricing available, call for quotes
*

This solicitation is intended for and is to be used for information purposes only; it is intended for Loan Agents, Brokers, and similar entities and is not intended for nor should it be provided to the general public

New England Wholesale Glastonbury, CT
Phone 800-654-5518 Registration Fax 203-633-6341

America

BankAmerica Mortgage

Effective Date and Time: 1:00 am May 29, 1996

FLOATING AN... FINANCES MUST BE LOCKED IN BY 5:00 PM May 29, 1996

PURCHASES MUST BE LOCKED IN BY 9:00 AM May 30, 1996

Products with limited prepayment options.

All products must close in BankAmerica's name.

1/1 SAF3PA

1/1 ARM Prepayment Option

RATE	60 DAY	90 DAY	120	180
6.750	1.250	1.500	2.000	2.500
6.875	0.750	1.000	1.500	2.000
7.000	0.250	0.500	1.000	1.500
7.125	-0.250	0.000	0.500	1.000
7.250	-0.750	-0.500	0.000	0.500
7.375	-1.000	-0.750	-0.250	0.250
7.500	-1.250	-1.000	-0.500	0.000
7.625	-1.500	-1.250	-0.750	-0.250
7.750	-1.750	-1.500	-1.000	-0.500
7.875	N/A	N/A	N/A	N/A

* Aggregate Life Cap 11.87%, Margin 2.75, Ideal 680
* First adj. cap 5.00%; subsequent adj. caps 2.00%
* 2nd homes + 0.5 pt.; investor .50 to rate, .25 to fee
* 80% LTV for Own Occ Purch to $300,000
* No cash out for investor/second home
* Qualify at 6nd fully indexed rate.

5/1 SAF5PA

5/1 ARM Prepayment Option

RATE	60 DAY	90 DAY	120	180
7.125	1.500	1.750	2.250	2.750
7.250	0.875	1.125	1.625	2.125
7.375	0.250	0.500	1.000	1.500
7.500	-0.375	-0.125	0.375	0.875
7.625	-1.000	-0.750	-0.250	0.250
7.750	-1.375	-1.125	-0.625	-0.125
7.875	-1.750	-1.500	-1.000	-0.500
8.000	-2.000	-1.750	-1.250	-0.750
8.125	-2.000	-1.750	-1.250	-0.750
8.250	N/A	N/A	N/A	N/A

* Aggregate Life Cap 11.87%, Margin 2.75, Ideal 680
* First adj. cap 5.00%; subsequent adj. caps 2.00%
* 2nd homes + 0.5 pt.; investor .50 to rate, .25 to fee
* 80% LTV for Own Occ Purch to $300,000
* No cash out for investor/second home
* Qualify at start rate

7/1 SAF7PA

7/1 ARM Prepayment Option

RATE	60 DAY	90 DAY	120	180
7.375	2.000	2.250	2.750	3.250
7.500	1.250	1.500	2.000	2.500
7.625	0.500	0.750	1.250	1.750
7.750	-0.250	0.000	0.500	1.000
7.875	-1.000	-0.750	-0.250	0.250
8.000	-1.375	-1.125	-0.625	-0.125
8.125	-1.750	-1.500	-1.000	-0.500
8.250	-2.000	-1.750	-1.250	-0.750
8.375	-2.000	-1.750	-1.250	-0.750
8.500	N/A	N/A	N/A	N/A

* Aggregate Life Cap 11.87%, High 2.75, Ideal 680
* First adj. cap 5.00%; subsequent adj. caps 2.00%
* 2nd homes + 0.5 pt.; investor .50 to rate, .25 to fee
* 80% LTV for Own Occ Purch to $300,000
* No cash out for investor/second home
* Qualify at start rate.

10/1 SAV10A

10/1 JUMBO ARM with Prepay. Option

RATE	60 DAY	90 DAY	120	180
7.375	2.125	2.375	2.875	3.375
7.500	1.500	1.750	2.250	2.750
7.625	0.875	1.125	1.625	2.125
7.750	0.250	0.500	1.000	1.500
7.875	-0.375	-0.125	0.375	0.875
8.000	-0.875	-0.625	-0.125	0.375
8.125	-1.375	-1.125	-0.625	-0.125
8.250	-1.875	-1.625	-1.125	-0.625
8.375	N/A	N/A	N/A	N/A
8.500	N/A	N/A	N/A	N/A

* Ceiling = start rate + 6%, Margin 2.75, Ideal 6.500
* Convertible
* 80% LTV for Own Occ Purch (No add-on)
* Max rebate at 2.00 / With loan amount $207,000.
* 2nd homes add 0.5 pt. / No investment property
* Call for quotes & options.

NET 5 SAF55A

Net 5 FIXED

RATE	60 DAY	90 DAY	120	180
7.125	1.750	2.000	2.500	3.000
7.250	1.125	1.375	1.875	2.375
7.375	0.500	0.750	1.250	1.750
7.500	0.125	0.375	0.875	1.375
7.625	-0.250	0.000	0.500	1.000
7.750	-0.625	-0.375	0.125	0.625
7.875	-1.000	-0.750	-0.250	0.250
8.000	-1.375	-1.125	-0.625	-0.125
8.125	-1.750	-1.500	-1.000	-0.500
8.250	-2.000	-1.750	-1.250	-0.750

* Adirondack Life Cap 11.875, Margin 2.75, Ideal 5.487
* 80% LTV for owner occ. purchase / rate term
* Mini-Jumbo loan $207,250 up to $ Ltd
* Flexible option: No investor cash out
* 5 yrs interest only, then 30 yrs at 5 mo. ARM
* No second homes

SPOT HUNCRA

Start Rate 1 yr Spot/Non-Convertible

RATE	60 DAY	90 DAY	120	180
5.375	-0.750	-0.500	0.000	0.375
5.500	-1.000	-0.750	-0.250	0.125
5.625	-1.250	-1.000	-0.500	-0.125
5.750	-1.500	-1.250	-0.750	-0.375
5.875	-1.750	-1.500	-1.000	-0.625
6.000	-2.000	-1.750	-1.250	-0.875
6.125	N/A	N/A	N/A	N/A
6.250	N/A	N/A	N/A	N/A
6.375	N/A	N/A	N/A	N/A
6.500	N/A	N/A	N/A	N/A

* Aggregate Life Cap 11.875, Margin 2.75, Ideal 6.500
* Owner occupied, 1 & 2 family primary only
* Prepayment penalty, first 3 yrs
* Assumption required. No cash-out refinance
* Must close in BankAmerica Mortgage's name
* For Convertible: add 0.25% rate (see HUYRA)

SA30PA

30 YR FIXED JUMBO with Prepayment

RATE	15 DAY	30 DAY	45 DAY	60 DAY
8.000	1.000	1.000	1.125	1.250
8.125	0.375	0.375	0.500	0.625
8.250	0.125	0.125	0.250	0.375
8.375	-0.500	-0.500	-0.375	-0.250
8.500	-1.000	-1.000	-0.875	-0.750
8.625	-1.375	-1.375	-1.250	-1.125
8.750	-1.875	-1.875	-1.750	-1.625
8.875	N/A	N/A	N/A	-2.000
9.000	N/A	N/A	N/A	-2.000
9.125	N/A	N/A	N/A	N/A

* 80% LTV O/O Purch; 80% LTV 2nd Home + 0.5 pt
* $207,000 to $444,000 (over $650,000 add 0.5 pts)
* No investor property
* Cash out to $100,000 @ 75% LTV add 0.5 pts
* 90/10/10; No PMI

SA15PA

15 YR FIXED JUMBO with Prepayment

RATE	15 DAY	30 DAY	45 DAY	60 DAY
7.625	0.750	0.750	0.875	1.000
7.750	0.250	0.250	0.375	0.500
7.875	-0.125	-0.125	0.000	0.125
8.000	-0.625	-0.625	-0.500	-0.375
8.125	-0.875	-0.875	-0.750	-0.625
8.250	-1.625	-1.625	-1.500	-1.375
8.375	-2.000	-2.000	-1.875	-1.750
8.500	N/A	N/A	N/A	-2.000
8.625	N/A	N/A	N/A	-2.000
8.750	N/A	N/A	N/A	N/A

* 80% LTV O/O Purch, 80% LTV 2nd Home + 0.5 pt
* $207,000 to $650,000 (over $450,000 add 0.5 pts)
* No investor property
* Cash out to $100,000 @ 75% LTV add 0.5 pts
* 90/10/10; No PMI

This document is intended for and is to be used for information purposes only. It is intended for Loan Agents, Brokers, and Lender Clients and is not intended for nor should it be provided to the general public.

New England Wholesale Glastonbury, CT
Phone 800-654-5518 Registration Fax 203-633-6341

Settlement Statement

U.S. Department of Housing and Urban Development

OMB No. 2502-0265

Type of Loan	File Number	Loan Number	Mortgage Insurance Case Number
1. ☐ FHA 2. ☐ FmHA 3. ☒ Conv. Unins. 4. ☐ VA 5. ☐ Conv. Ins.	HIRSCH	21547548	

NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "p.o.c." were paid outside of closing; they are shown here for informational purposes and are not included in the totals.

NAME AND ADDRESS OF BORROWER: DAVID L. HIRSCH and PAMELA C. HIRSCH
207 ROCKY SHOALS DRIVE, MIDLAND, GEORGIA 31820

NAME AND ADDRESS OF SELLER: CHARLES S. FERGUSON and TERRY L. FERGUSON

(Seller TIN -)

NAME AND ADDRESS OF LENDER: RODGERS ENTERPRISE, INC. D/B/A RODGERS MORTGAGE COMPANY
2013 DEVONSHIRE DRIVE, SUITE 117, COLUMBUS, GEORGIA 31904

PROPERTY LOCATION: 207 ROCKY SHOALS DRIVE
MIDLAND, GA 31820

SETTLEMENT AGENT: D. WAYNE SPENCE, P.C.

PLACE OF SETTLEMENT: 2945 GARDENIA STREET, COLUMBUS, GA. 31906
(TIN - 581363884)

SETTLEMENT DATE: June 20, 1996

J. SUMMARY OF BORROWER'S TRANSACTION		K. SUMMARY OF SELLER'S TRANSACTION	
100. GROSS AMOUNT DUE FROM BORROWER:		400. GROSS AMOUNT DUE TO SELLER:	
101. Contract sales price	230,000.00	401. Contract sales price	230,000.00
102. Personal property		402. Personal property	
103. Settlement charges to borrower (from line 1400)	11,850.18	403.	
104.		404.	
105.		405.	
ADJUSTMENTS FOR ITEMS PAID BY SELLER IN ADVANCE:		ADJUSTMENTS FOR ITEMS PAID BY SELLER IN ADVANCE:	
106. City/town taxes to		406. City/town taxes to	
107. County taxes to		407. County taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. GROSS AMOUNT DUE FROM BORROWER:	241,850.18	420. GROSS AMOUNT DUE TO SELLER:	230,000.00
200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER:		500. REDUCTIONS IN AMOUNT DUE TO SELLER:	
201. Deposit or earnest money	1,000.00	501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)	150,000.00	502. Settlement charges to seller (line 1400)	325.00
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
		504. Payoff of first mortgage loan	154,584.02
		505. Payoff of second mortgage loan	19,267.49
		506.	
		507. EXPRESS FEE FOR PAYOFF	15.00
		508.	
		509.	
ADJUSTMENTS FOR ITEMS UNPAID BY SELLER:		ADJUSTMENTS FOR ITEMS UNPAID BY SELLER:	
210. City/town taxes to		510. City/town taxes to	
211. County taxes 1/ 1/96 to 6/20/96	969.57	511. County taxes 1/ 1/96 to 6/20/96	969.57
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. TOTAL PAID BY/FOR BORROWER:	151,969.57	520. TOTAL REDUCTIONS IN AMOUNT DUE SELLER:	175,161.08
300. CASH AT SETTLEMENT FROM/TO BORROWER:		600. CASH AT SETTLEMENT TO/FROM SELLER:	
301. Gross amount due from borrower (line 120)	241,850.18	601. Gross amount due to seller (line 420)	230,000.00
302. Less amount paid by/for borrower (line 220)	151,969.57	602. Less reductions in amt. due seller (line 520)	175,161.08
303. CASH (☒ FROM) (☐ TO) BORROWER:	89,880.61	603. CASH (☒ TO) (☐ FROM) SELLER:	54,838.92

HUD-1 (3-86) - RESPA, HB 4305.2

SUBSTITUTE FORM 1099 SELLER STATEMENT: The information contained in Blocks E, G, H, and I and on line 401 (or if line 401 is asterisked, lines 403 and 404) is important tax information and is being furnished to the Internal Revenue Service. If you are required to file a return, a negligence penalty or other sanction will be imposed on you if this item is required to be reported and the IRS determines that it has not been reported.

SELLER INSTRUCTIONS: If this real estate was your principal residence, file Form 2119, Sale or Exchange of Principal Residence, for any gain, with your income tax return; for other transactions, complete the applicable parts of Form 4797, Form 6252 and/or Schedule D (Form 1040).

You are required by law to provide [see box H] with your correct taxpayer identification number. If you do not provide [see box H] with your correct taxpayer identification number, you may be subject to civil or criminal penalties imposed by law, and under penalties of perjury, I certify that the number shown on this statement is my correct taxpayer identification number.

_____ Seller's Signature

SETTLEMENT CHARGES

	PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
700. TOTAL SALES/BROKER'S COMMISSION BASED ON PRICE $ @ % =		
DIVISION OF COMMISSION (LINE 700) AS FOLLOWS:		
701. $ 5,615.00 to THE JORDAN COMPANY		
702. $ to		
703. Commission paid at settlement	5,615.00	
704.		
800. ITEMS PAYABLE IN CONNECTION WITH LOAN:		
801. Loan origination fee % RODGERS ENTERPRISE, INC. *	1,000.00	
802. Loan discount % RODGERS ENTERPRISE, INC. *	750.00	
803. Appraisal fee to RODGERS ENTERPRISE, INC. * (300.00 P.O.C.)		
804. Credit report to: RODGERS ENTERPRISE, INC. * (50.00 P.O.C.)		
805. Lender's inspection fee		
806. Mortgage insurance application fee to		
807. Assumption fee		
808. FLOOD CERTIFICATION TO BANKAMERICA	27.50	
809. TAX SERVICE FEE TO BANKAMERICA	63.00	
810. DOCUMENT PREP TO BANKAMERICA	100.00	
811. UNDERWRITING FEE TO BANKAMERICA	250.00	
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE:		
901. Interest from 6/20/96 to 7/ 1/96 @ $ 31.33 /day	344.69	
902. Mortgage insurance premium for mos. to		
903. Hazard insurance premium for 1 yrs. to BILL FORTSON AGENCY	818.00	
904. Flood insurance premium for yrs. to		
905.		
1000. RESERVES DEPOSITED WITH LENDER:		
1001. Hazard insurance 2 months @ $ 68.17 per month	136.34	
1002. Mortgage insurance months @ $ per month		
1003. City property taxes months @ $ per month		
1004. County property taxes 9 months @ $ 172.50 per month	1,552.50	
1005. Annual assessments months @ $ per month		
1006. Flood insurance months @ $ per month		
1007. months @ $ per month		
1008. AGGREGATE ESCROW ADJ months @ $ per month	-340.85	
1100. TITLE CHARGES:		
1101. Settlement or closing fee to		
1102. Abstract or title search to		
1103. Title examination to O. WAYNE SPENCE, P.C.	350.00	
1104. Title insurance binder to		
1105. Document preparation to O. WAYNE SPENCE, P.C.		75.00
1106. Notary fees to		
1107. Attorney's fees to (includes above items Numbers:)		
1108. Title insurance to AMERICAN PIONEER TITLE INS. CO. * (includes above items Numbers)	312.50	
1109. Lender's coverage $		
1110. Owner's coverage $		
1111.		
1112.		
1113.		
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES:		
1201. Recording fees: Deed $ 10.00 ; Mortgage $ 35.00 ; Releases $ 20.00	45.00	20.00
1202. City/county tax/stamps: Deed $; Mortgage $		
1203. State tax/stamps: Deed $ 230.00 ; Mortgage $ 450.00	450.00	230.00
1204.		
1205.		
1300. ADDITIONAL SETTLEMENT CHARGES:		
1301. Survey to HOBBS SMITH & ASSOCIATES	300.00	
1302. Pest inspection to		
1303. SEPTIC INSPECTION TO HARRIS COUNTY	35.00	
1304. COURIER FEE TO RODGERS ENTERPRISE, INC. *	35.00	
1305. GEORGIA RESIDENTIAL LOAN FEE TO RODGERS ENT *	6.50	
1306. PREMIUM PRICING P.O.C. BY BANK OF AMERICA TO RODGERS MORTGAGE *: $375.00		
1307.		
* RODGERS ENTERPRISE, INC. D/B/A RODGERS MORTGAGE COMPANY		
1400. TOTAL SETTLEMENT CHARGES	11,850.18	325.00

have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made n my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

orrower: DAVID L. HIRSCH Date: 6/20/96 Seller or Agent: CHARLES S. FERGUSON Date: 6/20/96

lorrower: PAMELA C, HIRSCH Date: 6/20/96 Seller or Agent: TERRY L. FERGUSON Date: 6/20/96

he HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance ith this statement.

Date: Settlement Agent: O. WAYNE SPENCE, P.C. Date: 6/20/96

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.

Bank of America

BankAmerica Mortgage
A Division of Bank of America, FSB

WHOLESALE LENDING DIVISION
ALL RATES AND POINTS ARE SUBJECT TO CHANGE AT ANY TIME

Effective Date and Time: 11:00 am March 6, 1997

Floating loans must be locked in by 5:00 pm

New application purchase/refinances must be locked in by 7:30 am

FIXED AND BALLOON

March 6, 1997

March 7, 1997

Effective 2/18, new improved pricing for 30/15 yr conforming fixed & 5/7 year balloons.
0.00

30YR BMF30A
30 YR FIXED CONFORMING

RATE	15 DAY	30 DAY	45 DAY	60 DAY
6 875	4.375	4.500	4.625	4.750
7 000	3.625	3.750	3.875	4.000
7 125	3 000	3.125	3.250	3.375
7 250	2 500	2.625	2.750	2.875
7 375	2 000	2 125	2.250	2.375
7 500	1.250	1.375	1.500	1.625
7 625	0.750	0.875	1.000	1.125
7 750	0.125	0.250	0.375	0.500
7 875	-0.375	-0.250	-0.125	0.000
8 000	-1.000	-0.875	-0.750	-0.625
8 125	-1.500	-1 375	-1.250	-1.125
8.250	-1.875	-1.750	-1 625	-1.500
8 375	-2.375	-2.250	-2.125	-2.000
8 500	-2.875	-2.750	-2.625	-2.500
8 625	N/A	N/A	-3.000	-2.875

* Ln Amts <$125,000, add to price .25 pts
* 75% LTV, Invst Purch 1 family (add 1.00 pts)
* For 2-1 lender funded buydown add 2.50 pts
* FNMA 97% at same price
* 80/10/10, PMI required
* 95% LTV Own Occ Purch; 90% LTV 2nd Home

15YR BMF15A
15 YR FIXED CONFORMING

RATE	15 DAY	30 DAY	45 DAY	60 DAY
6.750	2.125	2.250	2.375	2.500
6.875	1.500	1.625	1.750	1.875
7.000	1.000	1.125	1.250	1.375
7.125	0.500	0.625	0.750	0.875
7.250	0.125	0.250	0.375	0.500
7.375	-0.250	-0.125	0.000	0.125
7.500	-0.750	-0.625	-0.500	-0.375
7.625	-1.125	-1.000	-0.875	-0.750
7.750	-1.500	-1.375	-1.250	-1.125
7.875	-1.875	-1.750	-1.625	-1.500
8.000	-2.375	-2.250	-2.125	-2.000
8.125	-2.625	-2.500	-2.375	-2.250
8.250	-3.000	-2.875	-2.750	-2.625
8.375	N/A	N/A	N/A	-3.000
8.500	N/A	N/A	N/A	N/A

* Ln Amts <$125,000, add to price .25 pts
* 75% LTV; Invst Purch 1 family (add 1.00 pts)
* For 2-1 lender funded buydown add 2.125 pts
* Extended locks available (See Notes)
* 80/10/10; PMI required
* 95% LTV Own Occ Purch; 90% LTV 2nd Home

BA723 BMF07A
7 YEAR BALLOON CONFORMING

RATE	15 DAY	30 DAY	45 DAY	60 DAY
6.375	2.625	2.750	2.875	3.000
6.500	2.125	2.250	2.375	2.500
6.625	1.750	1.875	2.000	2.125
6.750	1.375	1.500	1.625	1.750
6.875	1.000	1.125	1.250	1.375
7.000	0.500	0.625	0.750	0.875
7.125	0.250	0.375	0.500	0.625
7.250	-0.125	0.000	0.125	0.250
7.375	-0.500	-0.375	-0.250	-0.125
7.500	-0.875	-0.750	-0.625	-0.500
7.625	-1.250	-1.125	-1.000	-0.875
7.750	-1.625	-1.500	-1.375	-1.250
7.875	-2.000	-1.875	-1.750	-1.625
8.000	-2.375	-2.250	-2.125	-2.000
8.125	-2.625	-2.500	-2.375	-2.250

* Ln Amts <$125,000, add to price .25 pts
* 90% LTV max o/o; 70% LTV max. o/o c/o refi
* 2nd home purchase 80% LTV max
* 80/10/10; PMI required
* No investor properties allowed
* For 2-1 lender funded buydown add 2.625 pts

30YR BM30PA
30 YR FIXED CONFORMING/PREPAY

RATE	15 DAY	30 DAY	45 DAY	60 DAY
8 125	-2.000	-1.875	-1.750	-1.625
8 250	-2.375	-2.250	-2.125	-2.000
8 375	-2.875	-2.750	-2.625	-2.500
8 500	N/A	N/A	N/A	-3.000
8 625	N/A	N/A	N/A	N/A
8 750	N/A	N/A	N/A	N/A
8 875	N/A	N/A	N/A	N/A
9 000	N/A	N/A	N/A	N/A
9 125	N/A	N/A	N/A	N/A
9 250	N/A	N/A	N/A	N/A
9 375	N/A	N/A	N/A	N/A
9 500	N/A	N/A	N/A	N/A
9 625	N/A	N/A	N/A	N/A
9 750	N/A	N/A	N/A	N/A
9 875	N/A	N/A	N/A	N/A

* Ln Amts <$125,000, add to price .25 pts
* 75% LTV; Invst Purch 1 family (add 1.00 pts)
* For 2-1 lender funded buydown add 2.50 pts
* FNMA 97% at same price
* 80/10/10; PMI required
* 95% LTV Own Occ Purch; 90% LTV 2nd Home

525 FCF05A
5 YEAR BALLOON CONFORMING

RATE	15 DAY	30 DAY	45 DAY	60 DAY
6.500	0.625	0.750	0.875	1.000
6.625	0.500	0.625	0.750	0.875
6.750	0.250	0.375	0.500	0.625
6.875	-0.125	0.000	0.125	0.250
7.000	-0.250	-0.125	0.000	0.125
7.125	-0.375	-0.250	-0.125	0.000
7.250	-0.500	-0.375	-0.250	-0.125
7.375	-0.625	-0.500	-0.375	-0.250
7.500	-0.750	-0.625	-0.500	-0.375
7.625	-0.875	-0.750	-0.625	-0.500
7.750	-1.000	-0.875	-0.750	-0.625
7.875	-1.125	-1.000	-0.875	-0.750
8.000	-1.375	-1.250	-1.125	-1.000
8.125	-1.625	-1.500	-1.375	-1.250
8.250	-1.750	-1.625	-1.500	-1.375

* Ln Amts <$125,000, add to price .25 pts
* No investment Property
* Second home, rate-term to 70%
* Occ Type : Primary and Second homes
* No subordinate financing
* 80% LTV maximum (purchase)

723bd BMF72A
7/23 2-1 BUYDOWN

START	15 DAY	30 DAY	45 DAY	60 DAY
4.375	N/A	N/A	N/A	N/A
4.500	N/A	N/A	N/A	N/A
4.625	N/A	N/A	N/A	N/A
4.750	N/A	N/A	N/A	N/A
4.875	3.875	4.000	N/A	N/A
5.000	3.375	3.500	3.625	3.750
5.125	3.125	3.250	3.375	3.500
5.250	2.750	2.875	3.000	3.125
5.375	2.375	2.500	2.625	2.750
5.500	2.000	2.125	2.250	2.375
5.625	1.625	1.750	1.875	2.000
5.750	1.250	1.375	1.500	1.625
5.875	0.875	1.000	1.125	1.250
6.000	0.500	0.625	0.750	0.875
6.125	0.250	0.375	0.500	0.625

* 90% LTV max - primary; No Investment Properties
* 7 Year Balloon with cond optn to extend to 23 yrs
* Extended locks available (see notes)
* Qualify at start rate; note rate 2% above start rate
* 80/10/10; PMI required

General Information for FIXED AND BALLOON PROGRAMS :

* Extended Locks add to 60 day price : 90 day + .250; 120 day +.75; 180 day + 1.25; 270 day +2.00 ; 1 pt. collected upfront, credited at closing
* Floatdown option available on New Construction/extended locks only.
  - For Conforming - Add .125% to current market rate, or .50 to pts. when exercised.
  - For Jumbo Fixed - Add .125% to rate or, .50 to pts. at time of lock-in.
* Waiver of tax/insurance escrows Max LTV is 80%; add .375 to pts. Not available on Investment Properties
* For All Investment properties add 1.00 pts. LTV's over 70% require 17% MI coverage.
* Please see Product Descriptions for details; Off sheet pricing available, call for quotes. * Subject to change
* 723 buydown purchase add 2.625 to 723 pts, start rate 2% below note rate
* Loans requesting 15 day locks must be released from underwriting and all closing conditions satisfied by BAM.

15 Day Expir.	30 Day Expir.	45 Day Expir	60 Day Expir.	90 Day Expir.	120 Day Expir.	180 Day Expir.	270 Day Expir.
3/20/97	4/4/97	4/21/97	5/5/97	6/3/97	7/3/97	9/1/97	12/1/97

This document is intended for and is to be used for information purposes only; it is intended for Loan Agents, Brokers, and similar entities and is not intended for nor should it be provided to the general public

Southeast Wholesale Jacksonville, FL Phone 800-806-8595 Fax 904-279-0050

Bank of America
BankAmerica Mortgage
A Division of Bank of America, FSB

WHOLESALE LENDING DIVISION
ALL RATES AND POINTS ARE SUBJECT TO CHANGE AT ANY TIME

Effective Date and Time: 11:00 am March 6, 1997
Floating loans must be locked in by 5:00 pm
New application purchase/refinances must be locked in by 7:30 am

ARM PRODUCTS

March 6, 1997
March 7, 1997

3/1 SAF31A
3/1 JUMBO ARM

RATE	60 DAY	90 DAY	120	180
6.875	2.500	2.750	3.250	3.750
7.000	2.000	2.250	2.750	3.250
7.125	1.500	1.750	2.250	2.750
7.250	1.000	1.250	1.750	2.250
7.375	0.500	0.750	1.250	1.750
7.500	0.000	0.250	0.750	1.250
7.625	-0.250	0.000	0.500	1.000
7.750	-0.500	-0.250	0.250	0.750
7.875	-0.750	-0.500	0.000	0.500
8.000	-1.000	-0.750	-0.250	0.250

* Adminstrd Life Cap 11.875, Mgn 2.75, Idx 5.600
* First adj. cap 3.00%, subsequent adj. caps 2.00%
* 2nd homes + 0.5 pt.; Investor .50 to rate, .25 to fee
* 95% LTV for Own Occ Purch to $300,000
* Loan amounts over $1mm add .75pt
* Qualify at the fully indexed rate

5/1 SAF51A
5/1 JUMBO ARM

RATE	60 DAY	90 DAY	120	180
7.000	3.125	3.375	3.875	4.375
7.125	2.500	2.750	3.250	3.750
7.250	1.875	2.125	2.625	3.125
7.375	1.250	1.500	2.000	2.500
7.500	0.625	0.875	1.375	1.875
7.625	0.000	0.250	0.750	1.250
7.750	-0.375	-0.125	0.375	0.875
7.875	-0.750	-0.500	0.000	0.500
8.000	-1.000	-0.750	-0.250	0.250
8.125	-1.000	-0.750	-0.250	0.250

* Adminstrd Life Cap 11.875, Mgn 2.75, Idx 5.600
* First adj. cap 3.00%; subsequent adj. caps 2.00%
* 2nd homes + 0.5 pt.; Investor .50 to rate, .25 to fee
* 95% LTV for Own Occ Purch to $300,000
* Loan amounts over $1mm add .75pt
* Qualify at start rate.

7/1 SAF71A
7/1 JUMBO ARM

RATE	60 DAY	90 DAY	120	180
7.250	3.750	4.000	4.500	5.000
7.375	3.000	3.250	3.750	4.250
7.500	2.250	2.500	3.000	3.500
7.625	1.500	1.750	2.250	2.750
7.750	0.750	1.000	1.500	2.000
7.875	0.000	0.250	0.750	1.250
8.000	-0.375	-0.125	0.375	0.875
8.125	-0.750	-0.500	0.000	0.500
8.250	-1.000	-0.750	-0.250	0.250
8.375	-1.000	-0.750	-0.250	0.250

* Adminstrd Life Cap 11.875, Mgn 2.75, Idx 5.600
* First adj. cap 3.00%; subsequent adj. caps 2.00%
* 2nd homes + 0.5 pt.; Investor .50 to rate, .25 to fee
* 95% LTV for Own Occ Purch to $300,000
* Loan amounts over $1mm add .75pt
* Qualify at start rate.

1YR SAV01A
1 YR JUMBO TREAS AVE ARM

RATE	60 DAY	90 DAY	120	180
6.125	-0.375	-0.125	0.375	0.875
6.250	-0.500	-0.250	0.250	0.750
6.375	-0.625	-0.375	0.125	0.625
6.500	-0.750	-0.500	0.000	0.500
6.625	-0.875	-0.625	-0.125	0.375
6.750	-1.000	-0.750	-0.250	0.250
6.875	N/A	N/A	N/A	N/A
7.000	N/A	N/A	N/A	N/A
7.125	N/A	N/A	N/A	N/A
7.250	N/A	N/A	N/A	N/A

* Adminstrd Life Cap 11.875, Mgn 3.00, Idx 5.605
* 2nd Home add 0.50 pts; Invest. prop +.50 rate, .25 pts
* Conforming loans add 0.000 to price
* Loan amounts over $1mm add .75pt
* 95% LTV to $300,000 / no conversion
* For Non-Convertible use SANC1A

SPOT SAVS1A
1 YR JUMBO SPOT ARM

RATE	60 DAY	90 DAY	120	180
5.625	-0.375	-0.125	0.375	0.875
5.750	-0.500	-0.250	0.250	0.750
5.875	-0.625	-0.375	0.125	0.625
6.000	-0.750	-0.500	0.000	0.500
6.125	-0.875	-0.625	-0.125	0.375
6.250	-1.000	-0.750	-0.250	0.250
6.375	N/A	N/A	N/A	N/A
6.500	N/A	N/A	N/A	N/A
6.625	N/A	N/A	N/A	N/A
6.750	N/A	N/A	N/A	N/A

* Adminstrd Life Cap 11.875, Mgn 3.00, Idx 5.600
* 2nd Home add 0.50 pts; Invest. prop +.50 rate, .25 pts
* Conforming loans add 0.250 to rate
* Loan amounts over $1mm add .75pt
* 95% LTV to $300,000 / no conversion
* For Non-Convertible use SANCSA

LIBOR SAVL6A
6 MONTH JUMBO LIBOR ARM

RATE	60 DAY	90 DAY	120	180
5.500	-0.375	-0.125	0.375	0.875
5.625	-0.500	-0.250	0.250	0.750
5.750	-0.625	-0.375	0.125	0.625
5.875	-0.750	-0.500	0.000	0.500
6.000	-0.875	-0.625	-0.125	0.375
6.125	-1.000	-0.750	-0.250	0.250
6.250	N/A	N/A	N/A	N/A
6.375	N/A	N/A	N/A	N/A
6.500	N/A	N/A	N/A	N/A
6.625	N/A	N/A	N/A	N/A

* Adminstrd Life Cap 11.875, Mgn 2.750, Idx 5.680
* 2nd Home + 0.50 pts; Invest. prop +.50 rate, .25 to pts
* Conforming loans add 0.000 to price
* Loan amounts over $1mm add .75pt
* 95% LTV to $300,000 / no conversion
* For Non-Convertible use SANCLA

10/1 SAV10A
10/1 JUMBO ARM

RATE	60 DAY	90 DAY	120	180
7.250	3.500	3.750	4.250	4.750
7.375	2.750	3.000	3.500	4.000
7.500	2.000	2.250	2.750	3.250
7.625	1.250	1.500	2.000	2.500
7.750	0.500	0.750	1.250	1.750
7.875	-0.250	0.000	0.500	1.000
8.000	-0.625	-0.375	0.125	0.625
8.125	-1.000	-0.750	-0.250	0.250
8.250	-1.000	-0.750	-0.250	0.250
8.375	-1.000	-0.750	-0.250	0.250

* Ceiling = start rate + 5%, Mgn 2.75, Idx 5.600
* No Prepayment Penalty / Convertible option avail.
* 95% LTV for Own Occ Purch (No add-on)
* Max rebate is 1.00 / Loan amts > $1mm add .75pt
* 2nd homes add 0.5 pt. / No investment property
* Minimum loan amount $214,650

AUF30A
30 YR FIXED JUMBO

RATE	15 DAY	30 DAY	45 DAY	60 DAY
7.625	1.750	1.875	2.000	2.125
7.750	1.375	1.500	1.625	1.750
7.875	0.625	0.750	0.875	1.000
8.000	0.000	0.125	0.250	0.375
8.125	-0.500	-0.375	-0.250	-0.125
8.250	-0.625	-0.500	-0.375	-0.250
8.375	-1.375	-1.250	-1.125	-1.000
8.500	-1.875	-1.750	-1.625	-1.500
8.625	N/A	N/A	-2.000	-1.875
8.750	N/A	N/A	N/A	-2.000

* 95% LTV O/O Purchase / LTV's > 90% add 1pt
* $214,650 to $650,000 (over $650,000 call for quote)
* 2nd Home +.50 pt, Max LTV 90% / No invst prop.
* Cash out add 0.25 pts
* 2-4 units add 1pt / High/Mid rise condos add 1pt
* No Cooperatives

AUF15A
15 YR FIXED JUMBO

RATE	15 DAY	30 DAY	45 DAY	60 DAY
7.250	1.125	1.250	1.375	1.500
7.375	0.625	0.750	0.875	1.000
7.500	0.250	0.375	0.500	0.625
7.625	-0.125	0.000	0.125	0.250
7.750	-0.625	-0.500	-0.375	-0.250
7.875	-1.000	-0.875	-0.750	-0.625
8.000	-1.375	-1.250	-1.125	-1.000
8.125	-1.750	-1.625	-1.500	-1.375
8.250	N/A	-2.000	-1.875	-1.750
8.375	N/A	N/A	N/A	-2.000

* 95% LTV O/O Purchase / LTV's > 90% add 1pt
* $214,650 to $650,000 (over $650,000 call for quote)
* 2nd Home +.50 pt, Max LTV 90% / No invst prop.
* Cash out add 0.25 pts
* 2-4 units add 1pt / High/Mid rise condos add 1pt
* No Cooperatives

General Information for ARM PRODUCTS:

* Extended Locks for SAVL6H, SAV06A, SAV01A & SAV01S (add to 60 day price): 90 day + .250; 120 day +.75; 180 day + 1.25; 270 day +2.00 (1 pt. collected upfront, credited at closing)
* 3/1, 5/1, & 7/1 PRICING FOR CONFORMING LOAN AMOUNTS, CALL FOR QUOTE.
* Waiver of tax/insurance escrows Max LTV is 80%; add .375 to pts. Not available on Investment Properties
* Floatdown available on SAV01A, SAVS1A, & SAVL6A only.
* Please see Product Descriptions for details; Off sheet pricing available, call for quotes. *Subject to change

This document is intended for and is to be used for information purposes only; it is intended for Loan Agents, Brokers, and similar entities and is not intended for nor should it be provided to the general public

Southeast Wholesale Jacksonville, FL Phone 800-806-8595 Fax 904-279-0050

Bank of America
BankAmerica Mortgage
A Division of Bank of America, FSB

WHOLESALE LENDING DIVISION
ALL RATES AND POINTS ARE SUBJECT TO CHANGE AT ANY TIME

Effective Date and Time: 11:00 am March 6, 1997

Floating loans must be locked in by 5:00 pm — March 6, 1997

New application purchase/refinances must be locked in by 7:30 am — March 7, 1997

Products with limited prepayment options.

All products must close in BankAmerica's name.

3/1 SAF3PA

3/1 JUMBO ARM with Prepayment.

RATE	60 DAY	90 DAY	120	180
6 875	1.625	1.875	2.375	2.875
7 000	1.125	1.375	1.875	2.375
7 125	0.625	0.875	1.375	1.875
7 250	0 125	0.375	0.875	1.375
7 375	-0.375	-0.125	0.375	0.875
7 500	-0.875	-0.625	-0.125	0.375
7 625	-1.125	-0.875	-0.375	0.125
7 750	-1.375	-1.125	-0.625	-0.125
7 875	-1.625	-1.375	-0.875	-0.375
8 000	-1.875	-1.625	-1.125	-0.625

* Admnstrd Life Cap 11.875, Mgn 2.75, Idx5.600
* First adj. cap 3.00%, subsequent adj. caps 2.00%
* 2nd homes + 0.5 pt ; Investor .50 to rate, .25 to fee
* 95% LTV for Own Occ Purch to $300,000
* Loan amounts over $1mm add .75pt
* Qualify at the fully indexed rate.

5/1 SAF5PA

5/1 JUMBO ARM with Prepayment

RATE	60 DAY	90 DAY	120	180
7.000	2.250	2.500	3.000	3.500
7.125	1.625	1.875	2.375	2.875
7.250	1.000	1.250	1.750	2.250
7.375	0.375	0.625	1.125	1.625
7.500	-0.250	0.000	0.500	1.000
7.625	-0.875	-0.625	-0.125	0.375
7.750	-1.250	-1.000	-0.500	0.000
7.875	-1.625	-1.375	-0.875	-0.375
8.000	-2.000	-1.750	-1.250	-0.750
8.125	-2.000	-1.750	-1.250	-0.750

* Admnstrd Life Cap 11.875, Mgn 2.75, Idx5.600
* First adj. cap 3.00%; subsequent adj. caps 2.00%
* 2nd homes + 0.5 pt.; Investor .50 to rate, .25 to fee
* 95% LTV for Own Occ Purch to $300,000
* Loan amounts over $1mm add .75pt
* Qualify at start rate.

7/1 SAF7PA

7/1 JUMBO ARM with Prepayment

RATE	60 DAY	90 DAY	120	180
7.250	2.875	3.125	3.625	4.125
7.375	2.125	2.375	2.875	3.375
7.500	1.375	1.625	2.125	2.625
7.625	0.625	0.875	1.375	1.875
7.750	-0.125	0.125	0.625	1.125
7.875	-0.875	-0.625	-0.125	0.375
8.000	-1.250	-1.000	-0.500	0.000
8.125	-1.625	-1.375	-0.875	-0.375
8.250	-2.000	-1.750	-1.250	-0.750
8.375	-2.000	-1.750	-1.250	-0.750

* Admnstrd Life Cap 11.875, Mgn 2.75, Idx5.600
* First adj. cap 3.00%; subsequent adj. caps 2.00%
* 2nd homes + 0.5 pt.; Investor .50 to rate, .25 to fee
* 95% LTV for Own Occ Purch to $300,000
* Loan amounts over $1mm add .75 pt
* Qualify at start rate.

10/1 SAV1BA

10/1 JUMBO ARM with Prepayment

RATE	60 DAY	90 DAY	120	180
7 250	2.625	2.875	3.375	3.875
7 375	1.875	2.125	2.625	3.125
7 500	1.125	1.375	1.875	2.375
7 625	0.375	0.625	1.125	1.625
7 750	-0.375	-0.125	0.375	0.875
7 875	-1.125	-0.875	-0.375	0.125
8 000	-1.500	-1.250	-0.750	-0.250
8 125	-1.875	-1.625	-1.125	-0.625
8 250	-2.000	-1.750	-1.250	-0.750
8 375	-2.000	-1.750	-1.250	-0.750

* Ceiling = start rate + 5%, Mgn 2.75, Idx 5.600
* Convertible
* 95% LTV for Own Occ Purch (No add-on)
* Max rebate is 2.00 / Loan amts > $1mm add .75pt
* 2nd homes add 0.5 pt / No investment property
* Minimum loan amount $214,650

SA30PA

30 YR FIXED JUMBO with Prepayment

RATE	15 DAY	30 DAY	45 DAY	60 DAY
7.375	2.625	2.750	2.875	3.000
7.500	1.875	2.000	2.125	2.250
7.625	1.250	1.375	1.500	1.625
7.750	0.875	1.000	1.125	1.250
7.875	0.125	0.250	0.375	0.500
8.000	-0.500	-0.375	-0.250	-0.125
8.125	-1.000	-0.875	-0.750	-0.625
8.250	-1.125	-1.000	-0.875	-0.750
8.375	-1.875	-1.750	-1.625	-1.500
8.500	N/A	N/A	N/A	-2.000

* 95% LTV O/O Purchase / LTVs > 90% add 1pt
* $214,650 to $650,000 (over $650,000 add 0.75 pts)
* 2-4 units add 1pt / High/Mid rise condos add 1 pt
* Cash out add 0.25 pts * 80/10/10; No PMI
* Extended locks, see page 1
* 2nd Home +.50 pt, Max LTV 90% / No Invst prop.

SA15PA

15 YR FIXED JUMBO with Prepayment

RATE	15 DAY	30 DAY	45 DAY	60 DAY
6.875	3.375	3.500	3.625	3.750
7.000	2.250	2.375	2.500	2.625
7.125	1.625	1.750	1.875	2.000
7.250	1.125	1.250	1.375	1.500
7.375	0.625	0.750	0.875	1.000
7.500	0.250	0.375	0.500	0.625
7.625	-0.125	0.000	0.125	0.250
7.750	-0.625	-0.500	-0.375	-0.250
7.875	-1.000	-0.875	-0.750	-0.625
8.000	-1.375	-1.250	-1.125	-1.000

* 95% LTV O/O Purchase / LTVs > 90% add 1pt
* $214,650 to $650,000 (over $650,000 add 0.75 pts)
* 2-4 units add 1 pt / High/Mid rise condos add 1pt
* Cash out add 0.25 pts * 80/10/10; No PMI
* Extended locks, see page 1
* 2nd Home +.50%, Max LTV 90% / No Invst prop.

This document is intended for and is to be used for information purposes only; it is intended for Loan Agents, Brokers, and similar entities and is not intended for nor should it be provided to the general public

Southeast Wholesale Jacksonville, FL Phone 800-806-8595 Fax 904-279-0050

BEST AVAILABLE COPY

[Enlargement of Portion of Rate Sheet
for BankAmerica Mortgage (March 6, 1997)]

15 YR 8MF15A

15 YR FIXED CONFORMING

RATE	15 DAY	30 DAY	45 DAY	60 DAY
6.750	2.125	2.250	2.375	2.500
6.875	1.500	1.625	1.750	1.875
7.000	1.000	1.125	1.250	1.375
7.125	0.500	0.625	0.750	0.875
7.250	0.125	0.250	0.375	0.500
7.375	-0.250	-0.125	0.000	0.125
7.500	-0.750	-0.625	-0.500	-0.375
7.625	-1.125	-1.000	-0.875	-0.750
7.750	-1.500	-1.375	-1.250	-1.125
7.875	-1.875	-1.750	-1.625	-1.500
8.000	-2.375	-2.250	-2.125	-2.000
8.125	-2.625	-2.500	-2.375	-2.250
8.250	-3.000	-2.875	-2.750	-2.625
8.375	N/A	N/A	N/A	-3.000
8.500	N/A	N/A	N/A	N/A

- Ln Amts <$125,000, add to price .25 pts
- 75% LTV; Invst Purch 1 family (add 1.00 pts)
- For 2-1 lender funded buydown add 2.125 pts
- Extended locks available (See Notes)
- 80/10/10; PMI required
- 95% LTV Own Occ Purch; 90% LTV 2nd Home

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

SETTLEMENT STATEMENT

William H. Arey, P.C.
4800 Armour Road
Columbus, Georgia 31904

B. TYPE OF LOAN

1. ☐ 2. ☐ FMHA 3. ☒ CONV. UNINS
4. ☐ VA 5. ☐ CONV. INS.

6. FILE NUMBER: 24249 7. LOAN NUMBER:

8. MORTGAGE INS. CASE NO.:

C. NOTE: *This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.*

D. NAME OF BORROWER: Beth A. Richardson
ADDRESS OF BORROWER: 4796 Bridlewood Drive, Columbus, Georgia 31909

E. NAME OF SELLER: REFINANCING
ADDRESS OF SELLER:

F. NAME OF LENDER: Atlanta American Mortgage of Columbus, Inc.
ADDRESS OF LENDER: #5 Bradley Park Court, Suite 104
Columbus, Georgia 31904

G. PROPERTY LOCATION: Lot 46, Block "B", Section One Addition, Bridlewood, Bk 99,
4796 Bridlewood Drive
Columbus, Georgia 31909

H. SETTLEMENT AGENT: William H. Arey, P.C.
PLACE OF SETTLEMENT: 4800 Armour Road
Columbus, Georgia 31904

I. SETTLEMENT DATE: March 26, 1997 (Disbursed March 31, 1997)

J. SUMMARY OF BORROWER'S TRANSACTION		K. SUMMARY OF SELLER'S TRANSACTION	
100. GROSS AMOUNT DUE FROM BORROWER:		**400. GROSS AMOUNT DUE TO SELLER:**	
101. Contract sales price		401. Contract sales price	
102. Personal property		402. Personal property	
103. Settlement charges to borrower: *(from line 1400)*	16,629.68	403.	
104. Providian Bancorp	5,017.31	404.	
105. Sears P/O	3,525.52	405.	
ADJUSTMENTS FOR ITEMS PAID BY SELLER IN ADVANCE:		ADJUSTMENTS FOR ITEMS PAID BY SELLER IN ADVANCE:	
106. City/town taxes to		406. City/town taxes to	
107. County taxes to		407. County taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. GROSS AMOUNT DUE FROM BORROWER: ▶	25,172.51	**420. GROSS AMOUNT DUE TO SELLER: ▶**	0.00
200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER:		**500. REDUCTIONS IN AMOUNT DUE TO SELLER:**	
201. Deposit or earnest money		501. Excess deposit *(see instructions)*	
202. Principal amount of new loan(s)	30,000.00	502. Settlement charges to seller (line 1400)	
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first mortgage loan	
205.		505. Payoff of second mortgage loan	
206.		506.	
207.		507.	
208.		508.	
209.		509.	
ADJUSTMENTS FOR ITEMS UNPAID BY SELLER:		ADJUSTMENTS FOR ITEMS UNPAID BY SELLER:	
210. City/town taxes to		510. City/town taxes to	
211. County taxes to		511. County taxes to	
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. TOTAL PAID BY/FOR BORROWER: ▶	30,000.00	520. TOTAL REDUCTIONS IN AMOUNT DUE TO SELLER: ▶	0.00
300. CASH AT SETTLEMENT FROM/TO BORROWER:		**600. CASH AT SETTLEMENT TO/FROM SELLER:**	
301. Gross amount due from borrower *(line 120)*	25,172.51	601. Gross amount due to seller *(line 420)*	
302. Less amount paid by/for borrower *(line 220)*	(30,000.00)	602. Less total reductions in amount due seller *(line 520)*	(
303. CASH (☐ *FROM)* (☒ *TO)* BORROWER: ▶	4,827.49	603. CASH (☐ *TO)* (☐ *FROM)* SELLER: ▶	

			PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
700. TOTAL SALES/BROKER'S COMMISSION: BASED ON PRICE $ @ %=				
DIVISION of COMMISSION (LINE 700) as FOLLOWS:				
701. $ to				
702. $ to				
703. Commission paid at settlement				
704.				
800. ITEMS PAYABLE IN CONNECTION WITH LOAN:				
801. Loan Origination fee %	to Atlanta American Mortgage of Columb		500.00	
802. Loan Discount %	to Atlanta American Mortgage of Columb		75.00	
803. Appraisal Fee to: Atlanta American Mortgage of Columb			300.00	
804. Credit Report to: Atlanta American Mortgage of Columb			60.00	
805. Lender's Inspection fee				
806. Mortgage Insurance application fee to				
807. Assumption fee				
808. Tax Service Fee to BankAmerica Mortgage			63.00	
809. Processing Fee to Atlanta American Mortgage of Columb			200.00	
810. Courier Fee to Atlanta American Mortgage of Columb			25.00	
811. Premium Pricing to POC (600.00) from B of A to AMM				
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE:				
901. Interest from 03/31/97 to 04/01/97	@ $ 6.575 /day		6.58	
902. Mortgage insurance premium for mo. to				
903. Hazard insurance premium for 12 mo. to				
904. Flood Insurance Premium for 12 mo. to				
905.				
1000. RESERVES DEPOSITED WITH LENDER:				
1001. Hazard insurance 2 months	@ $ 25.42 per month		50.84	
1002. Mortgage insurance months	@ $ per month			
1003. City property taxes months	@ $ per month			
1004. County property taxes 5 months	@ $ 72.52 per month		362.60	
1005. Annual assessments months	@ $ per month			
1006. months	@ $ per month			
1007. months	@ $ per month			
1008. months	@ $ per month			
1009. Aggregate Accounting Adjustment			-32.85	
1100. TITLE CHARGES:				
1101. Settlement or closing fee to				
1102. Abstract or title search to				
1103. Title examination to				
1104. Title insurance binder to				
1105. Document preparation to				
1106. Notary fees to				
1107. Attorney's fees to William H. Arey, P.C. (includes above items Numbers: 1101,1102,1103,1105,1106)			300.00	
1108. Title insurance to Old Republic National Title Insurance Company (includes above items Numbers: 1104)			100.00	
1109. Lender's coverage $ 30,000.00				
1110. Owner's coverage $				
1111.				
1112.				
1113.				
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES:				
1201. Recording fees: Deed $ 10.00	; Mortgage $ 29.00	; Releases $	39.00	
1202. City/county tax/stamps: Deed $	; Mortgage $			
1203. State tax/stamps: Deed $	; Mortgage $ 90.00		90.00	
1204.				
1205.				
1300. ADDITIONAL SETTLEMENT CHARGES:				
1301. Survey to				
1302. Pest inspection to				
1303. Flood Certification Fee to Bank of America			27.50	
1304. Document Prep Fee to Bank of America			100.00	
1305. Georgia Residential Loan Fee to Atlanta American Mortgage of Columb			6.50	
1306. Payoff/Account #026063159 to Montgomery Ward			1,789.02	
1307. Additional Charges as per attached Schedule A			12,567.49	
1400. TOTAL SETTLEMENT CHARGES *(Enter on line 103, Section J - and - line 502, Section K)* ▶			16,629.68	0.

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account by me in this transaction. I further certify that I have received a copy of HUD-1 Settlement Statement.

Beth A. Richardson
Beth A. Richardson
Borrowers

Sellers

The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement

Settlement Agent William H. Arey

Date: March 26, 1997
File No. 24249

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine or imprisonment. For details Title 18 U.S. Code Section 1001 and Section 1010.

Form No.: PTS-HU

APPENDIX O

BankAmerica Mortgage
A Division of Bank of America, FSB
A Division of Bank of America NT & SA (in California)

National
Wholesale Operating Bulletin

97-29-OPS August 20, 1997

1098 Reporting: Fee and Premium Price Credits, Origination and Discount Points for Conventional and FHA/VA Loans

Overview This bulletin provides instructions on the treatment of credits to ensure accurate 1098 reporting to the IRS and the customer. For production units that have not already implemented this process, it is effective for all transactions beginning September 8, 1997. This bulletin includes information on:

- IRS definition of terms
- Requirements for applying credits
- Lender credits
- Non-borrower paid interest
- Non-reportable points
- FHA/VA guidelines
- HUD number descriptions
- Examples of various pricing scenarios

Refer to the Pricing chapter in your channel-specific operating guide for complete details.

IRS definition of terms

The IRS defines certain terms which will terms be used throughout this bulletin. The IRS definition of terms are:

Points: Loan origination fee, loan discount, discount points, or points.

Service fees: All other fees, such as appraisal, title policy, credit report, tax service, etc. Does not include "points."

Requirements for applying credits

The requirements for applying credits to IRS defined points and service fees are as follows:

1. If a loan program designates specific fee(s) to be credited, apply the credits to that specific fee(s).
2. If a loan program allocates a general credit (not a rate buy-up or buy-down), first apply the credit to service fee(s), then points.
3. If loan pricing results in a credit from an interest rate buy-up (e.g., premium pricing, rebate, par-plus), first apply the credit to points, with the remainder, if any, to service fees.
4. The IRS defined points paid by the applicant disclosed on the HUD-1 generally must match the points reported on the Form 1098 that the bank sends to the customer at year-

end. If the Non-Rptb Points (Orig Fee) (%) field is utilized according to published procedures, then the HUD-1 and Form 1098 will not match; this is acceptable and will comply with IRS rules.

Sales communication

Visual Mortgage accepts lender credits but does not support overage, underage, or actual fee dollar lender credits. The loan officer must communicate on the applicable lock agreement or transmittal submitted to the production unit, the amount of the overage, underage, or lender credit.

Reporting for Wholesale

In 1997 for all Table-Funded loans in Eastern Wholesale, Bank America Mortgage will not perform 1098 reporting. In 1998, BankAmerica Mortgage will perform 1098 reporting for all transactions. A bulletin will be sent to Correspondents in December to notify them of the change.

Lender credits

When the applicant is granted a credit by the lender for unspecified closing costs, without an interest rate buyup, the following rules apply:

- Apply credits first to service fees, then the remainder, if any, to the reduction of points.
- Credits cannot exceed the total fees charged.

- Disclosure as lump sum lender credit is **not allowed**.

If there is a fee that the applicants will pay at closing for which the bank intends to reimburse the applicants, the amount will be shown on the *Good Faith Estimate*. The same amount will be added to the lender's credit to the applicant to "Zero out" the cost.

Origination/ discount combined with negative discount or premium price lender credits

The user must calculate the net total of the points from the Rate Sheet prior to the input on LPS.

Entry of the loan origination fee, *positive* discount, and premium price points for conventional loans are applied as follows:

- If total points is a *positive* value, apply the sum to Origination and/or Discount fields based on the HUD number descriptions.
- If the total points is a *negative* value, apply to the Lender Credit (%) field.

When there is a lender credit (negative amount) as a result of totaling the origination fee and loan discount fee from the rate sheet, enter the total net amount in the Lender Credit (%) field. Do not change this amount if the applicant receives a different amount, as this field is a component of the price and is used by Secondary Marketing. Instances

where the Lender Credit (%) may not match what the applicant receives are:

- In the case of an overage; or
- If the total fee credits exceed actual fees charged

The only instance when a value can be present in the Final Origination Fee and/or Final Discount Fee fields along with a value in the Lender Credit (%) field is if the sum total of Final Origination Fee, Final Discount Fee, and Lender Credit (%) fields equal the Overage\Underage (%) field. (See Attachment 2)

FHA/VA Loans: Refer to the section on FHA/VA loans for rules on applying origination and discount points.

Specific loan program fee-by-fee credits

If a loan program allocates credits to specific fees (e.g., Home Loan Value <HLV4>, Neighborhood Advantage® Fixed Rate No Closing Cost <FXNC>), adhere to the following rules:

- Credits must be applied to the specific fees outlined by the program.
- Disclosure as lump sum lender credit of these loan program types is **not allowed**.

Branch fee waivers

A fee waiver occurs when appraisal, credit report, application and/or other processing fees (ex-

cept points) are incurred by the lender on behalf of the applicant(s).

For a specific fee credit, dollars are not shown on both the JLM and JLO screens, unless the fee is shared between the buyer, seller, and/or 3rd party and the lender.

Refer to Pricing Guidelines in your channel-specific operating guide for details.

Non-borrower paid interest

Prepaid interest paid by anyone other than the applicant(s) is allowed and *must* be indicated on LPS as follows:

1. Any portion of Non-Borrower interest paid by *anyone* other than the applicant (e.g., seller, lender, or third party) must be reflected on screen D41 in the Seller paid column. Refer to the LPS Reference Guide (EXEC-6639) for more information on completing the D41 screen.
2. Include a condition on the Lender's Instructions that specifies how much of the interest is Non-Borrower Paid Interest (e.g., Task Tracking, Workbench). Please note that the system does not reflect it, although the amount is shown in the Seller column.

3.

Note: If the interest is lender paid, it is treated the same way as other non-borrower paid interest.

Non-reportable points/orig. (%) field

If the applicant is paying additional points to lower the interest rate, margin or lifetime cap, enter the percentage in the Non-Reportable points/Orig. (%) field that exceeds the customary charge as defined in the Pricing Guidelines in your channel-specific operating guide.

In Wholesale, points disclosed as paid to the Correspondent by the applicant are not included in the non-reportable points calculation.

Example: If the customary total combined maximum charge is 3.00% and the applicant is paying a total combined amount of 3.25% points as a result of a buydown of the interest rate, margin, or lifetime cap, enter .250% in the Non-Rptble Points (Orig Fee) (%) field on LPS.

Overage/ Overage (%) field

Overage or underage is entered in the Ovr/Undr (%) field. Underages are indicated with a negative <-> sign.

When an overage is used in conjunction with a premium price lender credit, the entire credit must be entered in Lender Credit (%) field, regardless of who is paying for the credit. The credit to

the applicant reflects a maximum of the lender's credit minus any overage. (See Attachments 2, 3, & 4)

Caution:

- If the credit is greater than the actual closing costs, the applicant cannot receive the difference.
- Dollar amounts for HUD# 204, 205, 208 & 209 must be entered ONLY on the JLO screen.
- Loan Origination and Discount points are reduced on the pricing screens, not the JLO screen.

Underage combined with premium pricing

In instances when an underage occurs, the combination of the underage and the net premium price equals the total credit to the applicant.

The value in the Overage\ Underage (%) field, combined with the net value of the premium price must be input **manually** in the LENDER CREDIT (%) field. **This is not automatic, refer to your channel-specific rate sheet for accurate information** (See Attachment 4).

Note: Underage is identified in the Overage\Underage (%) field with a negative sign <->.

Refer to Pricing Guidelines in your channel-specific operating guide for details.

FHA/VA Loans

FHA guidelines for non-recurring closing costs, lender and seller paid credits

Credits for allowable non-recurring closing costs (NRCC) cannot be applied to FHA loans as a lump sum. Service fees must be credited individually. For Lender-paid credits, show a zero for each service fee that will be credited on the JLM screen in the buyer column and enter *each* credited fee on the JLO screen, fee by fee, up to the total credit.

For seller-paid credits, enter each fee credited on the JLM screen in the Seller column, fee by fee, up to the total credit.

A fee that is split between Lender, Seller, 3rd party and/or Buyer must equal the total fee.

The applicant's actual total allowable NRCC, as shown on the HUD-1 closing statement, must agree (within $250) with those used in calculating the maximum loan amount.

FHA guidelines for recurring closing costs

Credits for recurring closing costs (RCC), such as. taxes, insurance, MI, and prepaid interest, can be applied to FHA loans as a lump sum. Disclose lump sum credits from Seller on HUD line # 210 on the JLM screen, for lender incurred use HUD line(s) # 209 and/or # 208 on the JLO screen.

The total lump sum amount cannot exceed the actual total RCC disclosed to the buyer. (See HUD lines 208, 209, 210)

Lender's Instructions must specify:

1. The amount of credit that the Seller and/or Lender will be paying.
2. That the lump sum credit for RCC can only be applied to RCC.

Credits disclosed in the purchase agreement and lender's instructions must be consistent with the credits on the HUD-1.

FHA & VA loan origination fee & loan discount

Entry of the Loan Origination Fee and the Loan Discount on FHA/VA loans must be applied as follows on LPS:

- If the total combined points, including loan origination fee and loan discount, exceeds 1.00%, the first 1.00% must be applied to Final Origination Fee field with the remaining points applied to Final Discount Fee field.
- If the total Loan Origination Fee and Discount is less than or equal to 1.00%, points are applied ONLY to the Final Loan Origination Fee field.
- If the total combined points result in a *Negative* value, apply to the Lender Credit (%) field.

The Final Loan Origination Fee field and Final Loan Discount Fee field will be zero.

When there is a lender credit (negative amount) as a result of totaling the origination fee and loan discount fee from the rate sheet, enter the total net amount in the Lender Credit (%) field. Do not change this amount if the customer receives a different amount, as this is a component of pricing and is used by Secondary Marketing. Instances where the Lender Credit (%) may not match what the applicant receives are:

- In the case of an overage; or
- If the total fee credits exceed actual fees charged

A value can be present in the Final Origination Fee and/or Final Discount Fee fields along with a value in the Lender Credit (%) field ***only if*** the sum total of Final Origination Fee, Final Discount Fee, and Lender Credit (%) fields equal the Overage\Underage (%) field. (See Attachment 2)

Questions

Your Operations Manager or RLP #1378

Frank Mercurio Outside or BN(510) 675-1612

Filing instructions

File this bulletin behind the Bulletins tab in your National Wholesale Operating Guide (CPM-213).

Attachment A
97-29-OPS
August 20,1997

HUD Number Descriptions

200 Series (Lump Sum) HUD Numbers Descriptions

The 200 series is for credits that an applicant will be receiving from the Seller and/or the Lender.

Use of lump sum credits may result in an overstated APR. This is acceptable and not a violation of Regulation Z.

Rules:

- Credit amount cannot exceed total of the buyer's paid non-recurring closing costs (NRCC) and/or recurring closing costs (RCC) fees.
- If the dollar credit is greater than the applicant's actual total closing costs, the applicant(s) *cannot* receive the difference in cash.
- Only enter dollar credits for HUD #'s 204, 205, 208 & 209 as POC on the JLO screen after IRS defined point fields equals zero.
- Dollar credits for HUD #'s 207 & 210 are entered in the seller column on the JLM screen.
- Entry of credits for HUD #'s 204, 205, 208 & 209 on the JLM screen is not allowed.

Note: Refer to your channel-specific operating guide for definitions of recurring and non-recurring closing costs.

HUD Number 204 NRCC: Lender Paid Credit	Use when Lender is granting applicant a dollar credit toward unspecified NRCC.

HUD 205 NRCC Premium Pricing Credit	Premium pricing is used when the applicant buys-up the interest rate to obtain a credit towards non-recurring closing costs. The credit can only be applied to the applicant NRCC. Enter a credit in this field when the IRS defined Point fields equals zero.
HUD 207 NRCC Seller Paid Credit	Seller's lump-sum credit applied to the applicant's NRCC. This line cannot be used for crediting recurring closing costs, (See HUD # 210.)
HUD 208 RCC Lender Paid Credit	Used when lender is granting applicant(s) a general dollar credit toward unspecified RCC.
HUD 209 RCC Lender Premium Pricing Credit	Use this line to apply lender's premium pricing credit toward RCC. Do not use this line for lender promotional credits to be applied to RCC, use HUD line 208. Enter a credit in this field if the IRS defined point fields equal zero.
HUD 210 RCC Seller Paid Credit	Use this line to apply seller's credit toward RCC.

801 And 802 HUD Numbers Descriptions

⇒ The total dollar amounts must equal the values entered on the pricing screens as reflected in the Memo column on the JLM screen.

⇒ Points are reduced on the pricing screens, not the JLO screen.

HUD 801 Origination Fee This fee covers the lender's administrative costs in processing the loan. Computed as a percentage of the loan, it is disclosed as a percentage and as a dollar amount.

HUD 802 Loan Discount (Points) Also referred to as points; a charge used to adjust the yield on the loan to what market conditions demand. Each point is equal to one percent of the mortgage amount.

Example 1: Loan with Premium Price

- ⇒ Rate Sheet reflects rate of 7.875 with <.250> % Premium Price on a 15 day lock.
- ⇒ Total credit available to applicant(s) is <.250>% or $250 maximum base on $100,000 loan amount Lender Credit dollars are reflected on HUD 205, screen JLO.

Note: *The Premium Price percentage is* ***ALWAYS*** *reflected in the LENDER CREDIT (%) field, but all or portions may not be included as a credit to the applicant.*

RATE SHEET

2MF Owner Occupied, 1 - 4 units	30 YEAR 15 DAY LOCK	30 YEAR		45 DAY LOCK		
Loan Amounts	Rate	Orig Fee	APR	Rate	Orig Fee	APR
$5,000 - $214,600	8.250	(1.500)	8.25	8.250	(1.375)	
	8.125	(1.250)	8.13	8.125	(1.000)	
For Prepayment	8.000	(0.750)	8.00	8.000	(0.500)	
Options:	***7.875***	***(0.250)***	7.88	7.875	0.000	
See Page 5	7.750	0.250	7.84	7.750	0.500	

LPS

LOAN INFORMATION - DISPLAY ONLY

FINAL RATE	7.87500	FINAL MARGIN	
FINAL ORIGINATION FEE		**FINAL LIFETIME CAP**	
FINAL DISCOUNT FEE		FINAL INDEX	
FINAL DELIVERY FEE		FINAL CEILING RATE	
FINAL BUYDOWN FEE			
FINAL BUY UP FEE		COST OF ORIGINATION	
FINAL EMPLOYEE RATE		FINAL EMPLOYEE MARGIN	
FINAL EMPLOYEE DISCOUNT			
LENDER CREDIT (%)	***.25000***	**OVERAGE\UNDERAGE (%)**	

KEY 0060009570 PCD 41 SUB 88 NAME MARTIN FUNC U SCREEN JLO

LENDER INCURRED

* REVEAL *								
O	HUD#	DESCRIPTION	D M	B	POC	DEBIT	WAIVER	UNIT	PROMO CODE
_	204	NRC LNDR CR	O	S	0.00	0.00	0.00		0.00	
_	**205**	**NRC PAR+ CR**	**O**	**S**	***250.00***	**250.00**	**0.00**		**0.00**	
_	207	NRC SELR CR	O	S	0.00	0.00	0.00		0.00	
_	208	RC LNDR CR	O	S	0.00	0.00	0.00		0.00	

Example 2: Loan with Combination of Overage and Premium Price

Rate Sheet reflects rate of 7.875 with <.250>% Premium Price on a 15 day lock. Retail Sales officer is charging an additional .750% Origination to achieve a 1.00% total overage.

Note: *The sales officer is eliminating the .250% lender credit as part of the overage. Therefore, no Lender Credit dollars on HUD 205, screen JLO are reflected as a credit to the applicant. The Premium Price percentage is* ***ALWAYS*** *reflected in the LENDER CREDIT (%) field, but all or portions may not be included as a credit to the applicant.*

RATE SHEET

2MF Owner Occupied, 1 - 4 units	30 YEAR 15 DAY LOCK	30 YEAR		45 DAY LOCK		
Loan Amounts	Rate	Orig Fee	APR	Rate	Orig Fee	APR
$5,000 - $214,600	8.250	(1.500)	8.25	8.250	(1.375)	
	8.125	(1.250)	8.13	8.125	(1.000)	
For Prepayment	8.000	(0.750)	8.00	8.000	(0.500)	
Options:	***7.875***	***(0.250)***	**7.88**	**7.875**	**0.000**	
See Page 5	7.750	0.250	7.84	7.750	0.500	

LPS

LOAN INFORMATION - DISPLAY ONLY

FINAL RATE	7.87500	FINAL MARGIN	
FINAL ORIGINATION FEE	***.750000***	**FINAL LIFETIME CAP**	
FINAL DISCOUNT FEE		FINAL INDEX	
FINAL DELIVERY FEE		FINAL CEILING RATE	
FINAL BUYDOWN FEE			
FINAL BUY UP FEE		COST OF ORIGINATION	
FINAL EMPLOYEE RATE		FINAL EMPLOYEE MARGIN	
FINAL EMPLOYEE DISCOUNT			
LENDER CREDIT (%)	***.25000***	**OVERAGE\UNDERAGE (%)**	***1.00000***

KEY 0060009570 PCD 41 SUB 88 NAME MARTIN FUNC U SCREEN JLO

LENDER INCURRED

* REVEAL									
O	HUD#	DESCRIPTION	D M	B	POC	DEBIT	WAIVER	UNIT	PROMO CODE
	204	NRC LNDR CR	O	S	0.00	0.00	0.00		0.00
	205	**NRC PAR+ CR**	**O**	**S**	***0.00***	**0.00**	**0.00**		**0.00**
	207	NRC SELR CR	O	S	0.00	0.00	0.00		0.00
	208	RC LNDR CR	O	S	0.00	0.00	0.00		0.00

Example 3: Loan with Combination of Overage and Premium Price

Rate Sheet reflects rate of 7.875 with <.250>% Premium Price on a 15 day lock. Retail Sales officer is splitting the <.250>% Premium Price with the applicant(s), tak-ing .125% as overage.

Overage is .125%, LENDER CREDIT % remains at .250%. Lender Credit dollar would be now based on .125% with a loan amount of $100,000 or $125.00 maximum credit.

Note: *Since the Sales officer is taking .125% as overage, maximum Lender Credit dollar credits on HUD 205 (screen JLO), are reflected as a credit to the applicant. The Premium Price percentage is* ***ALWAYS*** *reflected in the Lender Credit (%) field, but all or portions may not be included as a credit to the applicant.*

RATE SHEET

2MF Owner Occupied, 1 - 4 units	**30 YEAR** 15 DAY LOCK	**30 YEAR**		45 DAY LOCK		
Loan Amounts	Rate	Orig Fee	APR	Rate	Orig Fee	APR
$5,000 - $214,600	8.250	(1.500)	8.25	8.250	(1.375)	
	8.125	(1.250)	8.13	8.125	(1.000)	
For Prepayment	8.000	(0.750)	8.00	8.000	(0.500)	
Options:	***7.875***	***(0.250)***	**7.88**	**7.875**	**0.000**	
See Page 5	7.750	0.250	7.84	7.750	0.500	

LPS

LOAN INFORMATION - DISPLAY ONLY

FINAL RATE	7.87500	FINAL MARGIN	_____
FINAL ORIGINATION FEE	_____	FINAL LIFETIME CAP	_____
FINAL DISCOUNT FEE	_____	FINAL INDEX	_____
FINAL DELIVERY FEE	_____	FINAL CEILING RATE	_____
FINAL BUYDOWN FEE	_____		
FINAL BUY UP FEE	_____	COST OF ORIGINATION	_____
FINAL EMPLOYEE RATE	_____	FINAL EMPLOYEE MARGIN	_____
FINAL EMPLOYEE DISCOUNT	_____		
LENDER CREDIT (%)	***.25000***	**OVERAGE\UNDERAGE (%)**	***.125000***

Apply .125% Lender Credit to HUD# 205 on screen JLO base on a loan amount of $100,000.

KEY 0060009570 PCD 41 SUB 88 NAME MARTIN FUNC U SCREEN JLO

LENDER INCURRED

* REVEAL									
O	HUD#	DESCRIPTION	D M	B	POC	DEBIT	WAIVER	UNIT	PROMO CODE
	204	NRC LNDR CR	O	S	0.00	0.00	0.00		0.00
_	**205**	**NRC PAR+ CR**	**O**	**S**	***125.00***	**125.00**	**0.00**	_____	**0.00** _____
_	207	NRC SELR CR	O	S	0.00	0.00	0.00	_____	0.00 _____
_	208	RC LNDR CR	O	S	0.00	0.00	0.00	_____	0.00 _____

Example 4: Loan with Combination of Underage and Premium Price

Rate Sheet reflects rate of 7.875 with <.250>% Premium Price on a 15 day lock. Retail Sales officer is paying an additional <.375>% credit as Underage.

The .375% *Underage* is entered in Overage\Underage (%) field as a negative value,<->. Lender Credit % increases to .625%, reflecting the combination of the <.250>% Premium Price added to the .375% underage. Points would be -0- and Lender Credit doHar would be now based on .625% not to exceed total maximum closing costs.

RATE SHEET

2MF Owner Occupied, 1 - 4 units	30 YEAR 15 DAY LOCK	30 YEAR		45 DAY LOCK		
Loan Amounts	Rate	Orig Fee	APR	Rate	Orig Fee	APR
$5,000 - $214,600	8.250	(1.500)	8.25	8.250	(1.375)	
	8.125	(1.250)	8.13	8.125	(1.000)	
For Prepayment	8.000	(0.750)	8.00	8.000	(0.500)	
Options:	***7.875***	***(0.250)***	**7.88**	**7.875**	**0.000**	
See Page 5	7.750	0.250	7.84	7.750	0.500	

LPS

LOAN INFORMATION - DISPLAY ONLY

FINAL RATE	7.87500	FINAL MARGIN	
FINAL ORIGINATION FEE		FINAL LIFETIME CAP	
FINAL DISCOUNT FEE		FINAL INDEX	
FINAL DELIVERY FEE		FINAL CEILING RATE	
FINAL BUYDOWN FEE			
FINAL BUY UP FEE		COST OF ORIGINATION	
FINAL EMPLOYEE RATE		FINAL EMPLOYEE MARGIN	
FINAL EMPLOYEE DISCOUNT			
LENDER CREDIT (%)	***.62500***	**OVERAGE\UNDERAGE (%)**	***.375000-***

Apply .625% Lender Credit to HUD# 205 on screen JLO base on a loan amount of $100,000.

KEY 0060009570 PCD 41 SUB 88 NAME MARTIN FUNC U SCREEN JLO

LENDER INCURRED

* REVEAL								
O HUD#	DESCRIPTION	D M	B	POC	DEBIT	WAIVER	UNIT	PROMO CODE
204	NRC LNDR CR	O	S	0.00	0.00	0.00		0.00
205	**NRC PAR+ CR**	**O**	**S**	***625.00***	**625.00**	**0.00**		**0.00**
207	NRC SELR CR	O	S	0.00	0.00	0.00		0.00
208	RC LNDR CR	O	S	0.00	0.00	0.00		0.00

Example 5: FHA/VA Loan with Combination of Origination and Negative Discount (Premium Price)

Loan rate of 7.750 with 1.00% Origination and <.250>% Discount (Premium Price). NET the combined values of the 1.00% Origination and <.250>% Discount to result in a .750% total Origination Fee.

RATE SHEET

Fixed Rate Effective Date: 6/24/97 6:47 AM

FHA / VA Fixed Rate Loans

3MF / 4MF	**30 YEAR**		**DISCOUNT POINTS**		
Owner Occupied Only	Rate	Orig Fee	APR	15 DAY	45 DAY
Eligible properties and loan	8.000	1.000	8.86	(1.000)	(1.000)
amounts vary by transaction	***7.750***	***1.000***	***8.74***	***(0.250)***	**0.000**
Refer to your procedures	7.500	1.000	8.54	0.250	0.500
	7.250	1.000	8.50	2.125	2.375
	7.000	1.000	8.31	2.625	2.875

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LOAN INFORMATION - DISPLAY ONLY

FINAL RATE 7.75000	FINAL MARGIN . . . . .
FINAL ORIGINATION FEE 75000	**FINAL LIFETIME CAP . . . .**
FINAL DISCOUNT FEE	FINAL INDEX . . . . .
FINAL DELIVERY FEE	FINAL CEILING RATE . . . . .
FINAL BUYDOWN FEE	
FINAL BUY UP FEE	COST OF ORIGINATION . . . .
FINAL EMPLOYEE RATE	FINAL EMPLOYEE MARGIN . . . . .
FINAL EMPLOYEE DISCOUNT	
LENDER CREDIT (%)	OVERAGE\UNDERAGE (%) . . . . .

Example 6: FHA/VA Loan with Premium Price (Negative Discount)

Loan rate of 8.000% with 1.00% Origination and <2.375>% Premium Price NET the combined values of the 1.00% Origination and <2.375>% Premium Price to result in a <1.375>% total Premium Price.

RATE SHEET

Fixed Rate Effective Date: 7/08/97 7:04 AM

FHA / VA Fixed Rate Loans

3MF / 4MF	30 YEAR		DISCOUNT POINTS		
Owner Occupied Only	Rate	Orig Fee	APR	15 DAY	45 DAY
Eligible properties and loan	***8.000***	***1.000***	***8.78***	***(2.375)***	***(2.125)***
amounts vary by transaction	7.750	1.000	8.64	(1.000)	(0.750)
Refer to your procedures	7.500	1.000	8.45	(0.500)	(0.250)
	7.250	1.000	8.39	1.2500	1.5000
	7.000	1.000	8.31	2.625	2.875

LPS

LOAN INFORMATION - DISPLAY ONLY

FINAL RATE 8.00000	FINAL MARGIN . . . . .
FINAL ORIGINATION FEE . . .	FINAL LIFETIME CAP . . . . .
FINAL DISCOUNT FEE	FINAL INDEX . . . . .
FINAL DELIVERY FEE	FINAL CEILING RATE . . . . .
FINAL BUYDOWN FEE	
FINAL BUY UP FEE	COST OF ORIGINATION . . . .
FINAL EMPLOYEE RATE	FINAL EMPLOYEE MARGIN
FINAL EMPLOYEE DISCOUNT	
LENDER CREDIT (%) *1.375000*	**OVERAGE\UNDERAGE (%) . . .**

. . KEY 0010513591 PCD 41 SUB 88 NAME ROED FUNC U SCREEN JLO

. . . . . LENDER INCURRED . . . . . .

| * REVEAL |

O	HUD#		DESCRIPTION	D M	B	POC	DEBIT	WAIVER	UNIT	PROMO	CODE
_	206		NDHFA CREDT	O	S	0.00	0.00	0.00		0.00	
_	801	*	ORIGINATION		S	0.00	0.00	0.00		0.00	
_	802	*	DSCNT-PBDWN		S	0.00	0.00	0.00		0.00	
_	802	*	DSCNT-PTS		S	0.00	0.00	0.00		0.00	
_	803		APPRAISAL		S	275.00	275.00	275.00	7425	0.00	
_	804		CREDIT RPT		S	13.00	13.00	13.00	7425	0.00	
_	805	*	LND INSPECT		S	0.00	0.00	0.00		0.00	
_	808	*	TAX LIEN	L	S	63.00	63.00	63.00	7425	0.00	
_	815	*	FLOOD CERT	L	S	27.50	27.50	27.50	7425	0.00	
_	833		SAT CMP CRT		S	0.00	0.00	0.00		0.00	
_	837	*	FLOAT DOWN		S	0.00	0.00	0.00		0.00	
_	838	*	COMMTMT FEE		S	0.00	0.00	0.00		0.00	
_	902	*	PMI	L	S	0.00	0.00	0.00		0.00	
_	903		HAZARD INS	O	S	0.00	0.00	0.00		0.00	
_	904		FLOOD INS	O	S	0.00	0.00	0.00		0.00	
SUB TOTAL						1375.00	1375.00	1375.00		0.00	

I105-JLO T=030 S=030 H=000

APPENDIX P

[MORTGAGE BANKERS ASSOCIATION'S TALKING POINTS, REDLINE VERSION OF HUD'S 1999 POLICY STATEMENT]

What we are asking for:

We are not asking for elimination of class actions or wiping out liability. The clarification is only a piece of evidence as to what HUD thinks the law is.

What we are offering:

Our suggestion: A mandatory contract between the broker and the borrower that clearly establishes the amount of the payment and the method of payment. Not just disclosure, but a binding legal contract.

Why this works for Consumers and the Senate.

First the relief we are asking for is not nearly as far reaching as consumers and the Senate may have believed. They appear to think that we wanted HUD to wipe out liability and class actions. This is not what the clarification does.

Second, the mandatory contract we are proposing directly addresses the consumer and senate issues: How much the broker is getting and what the relationship is.

The Senate and consumers do not want the retroactive relief, but they do want a better system going forward. So it's a fair compromise, especially since the relief is simply a clarification and does not have the effect of ending any suits or cutting off anybody's legal rights.

How to do it:

Issue the clarification as we have proposed in a policy statement published in the federal register. Simultaneously, issue an interim rule with the new broker fee agreement effective in 30 days. This takes care of the

desire of consumers and the senate to move both relief and prospective changes simultaneously.

*[64 FR 10080]**
FEDERAL REGISTER

[Vol. 64, No. 39]
Rules and Regulations
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD)

Office of the Assistant Secretary for Housing – Federal Housing Commissioner
24 CFR Part 3500
[Docket No. FR-4450-N-01]

RIN 2502-AH33
Real Estate Settlement Procedures Act (RESPA)
Amended Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers
Part IV

DATE: ~~Monday, March 1, 1999~~ July , 2001

ACTION: Amended Statement of Policy 1999-1

[*10080]

SUMMARY: This Statement of Policy sets forth the Department of Housing and Urban Development's position on the legality of lender payments to mortgage brokers in connection with federally related mortgage loans under the Real Estate Settlement Procedures Act ("RESPA") and HUD's implementing regulations. The Statement of Policy 1999-1 issued effective March 1, 1999, was promulgated to fulfill the express directive in the Conference Report on the 1999 HUD Appropriations Act that the Department clarify its position on this subject and eliminate "legal uncertainty" in this area.

HUD is aware that many court decisions have considered the Statement of Policy 1999-1 since it was issued. Although most courts have found it to articulate

the two-part test HUD intended, the Statement of Policy 1999-1 has not been uniformly interpreted. More specifically, in *Culpepper v. Irwin Mortgage Corporation*, (No. 99-13725, 11th Cir., June 15, 2001), the Eleventh Circuit Court of Appeals found the Statement of Policy 1999-1 "ambiguous" as to the proper application of the first part of its two-part test. As a consequence of that pronouncement by the highest court yet to pass on this question, there is great concern that precisely the type of legal uncertainty the Statement of Policy 1999-1 was intended to remove exists now and will continue to exist unless corrected.

Pursuant to the Conference Report directive, Section 19(a) of RESPA (12 U.S.C. 2617(a)) and 24 CFR 3500.4(a)(l)(ii), HUD clarifies through this amendment the precise nature of the two-part test for liability intended in the Statement of Policy 1999-1. In issuing this amendment, HUD does not endeavor to revisit the subject of lender payments to mortgage brokers anew.[1] It also does not address the propriety of class certification, the procedural issue pending before the court in the *Culpepper* decision. Instead, HUD seeks merely to remove any cause for confusion in the original language of the Statement of Policy 1999-1. This Amended Statement of Policy 1999-1 supersedes all intervening opinion letters or informal guidance.

In issuing this amendment, HUD continues to be guided by the fact that the ultimate issue posed under Section 8 of RESPA as it applies in this context is whether a lender payment to a mortgage broker was compensation for goods or facilities actually furnished, or services actually provided 12 U.S.C. § 2607(c). It was always the intent in the Statement of Policy 1999-1 that the question of whether a payment was for goods, services

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[1] HUD does not find it necessary or appropriate in issuing this amendment to revise the preamble to the Statement of Policy 1999-1, even though some purely historical facts recited in the preamble (such as the pendency of proposed rulemaking in this area) have since changed.

or facilities would be answered by applying not just one, but both parts of the two-part test. The amendment clarifies this point by, among other things, deleting the "for" language from the introductory statements of the first part of the test, which some had incorrectly read as asking the ultimate question to be answered in that initial step. The amendment clarifies that the first inquiry is whether compensable goods or services were actually furnished or compensable services were actually performed. This element requires there to be evidence that the mortgage broker is entitled to be compensated in the first instance, a fact that would not exist in a naked referral (*i.e.*, where the broker does nothing other than direct settlement service business in exchange for the lender payment). Where the broker does provide compensable goods, services or facilities, the question of whether the lender payment was for those compensable items is answered by turning to the determinative second step of the test. There, the total compensation received by the broker from any source must be reasonably related to the value of the goods, services or facilities being compensated. This second part of the test compares the broker's total compensation with what other brokers are paid for providing those goods, services or facilities in similar transactions in similar markets. If the mortgage broker's total compensation bears no reasonable relationship to the market value of the goods, services or facilities provided, then there is evidence that the lender's payment in excess of the market rate was not for those compensable items, but was instead a referral fee in violation of Section 8.

While this amended statement satisfies the Conferees' directive in the Conference Report on the 1999 HUD Appropriations Act that the Department clarify its position on this subject, HUD ~~believes~~ continues to believe that broad ~~legislative~~ reform along the lines specified in the HUD/Federal Reserve Board Report remains the most effective way to resolve the difficulties

and legal uncertainties under RESPA and the Truth in Lending Act (TILA) for industry and consumers alike. ~~Statutory changes~~ Changes like those recommended in the Report would, if adopted, provide the most balanced approach to resolving these contentious issues by providing consumers with better and firmer information about the costs associated with home-secured credit transactions and providing creditors and mortgage brokers with clearer rules. Such an approach is far preferable to piecemeal actions.

EFFECTIVE DATE: This Amended Statement of Policy is effective ~~March 1, 1999~~ July , 2001.

FOR FURTHER INFORMATION CONTACT: Rebecca J. Holtz, Director RESPA/ILS Division Room 9146, Department of Housing and Urban Development, Washington, DC 20410; telephone 202-708-4560, or (for legal questions) Kenneth A. Markison, Assistant General Counsel for GSE/RESPA ~~or Rodrigo Alba, Attorney for RESPA~~, Room 9262, Department of Housing and Urban Development, Washington, DC 20410; telephone 202-708-3137 (these are not toll free numbers). Hearing or speech-impaired individuals may access these numbers via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: This Preamble to the Statement of Policy includes descriptions of current practices in the industry. It is not intended to take positions with respect to the legality or illegality of any practices; such positions are set forth in the Statement of Policy itself.

I. Background

A. General Background

The Conference Report on the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999 (H.R. Conf. Rep. No. 105-769, 105th Cong., 2d Sess. 260

(1998)) (FY 1999 HUD Appropriations Act) directs HUD to clarify its position on lender payments to mortgage brokers within 90 days after the enactment of the FY 1999 HUD Appropriations Act on October 21, 1998. The Report states that "Congress never intended payments by lenders to mortgage brokers for goods or facilities actually furnished or for services actually performed to be violations of [Sections 8](a) or (b) of the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*) (RESPA)]" (Id.). The Report also states that the Conferees "are concerned about the legal uncertainty that continues absent such a policy statement" and "expect HUD to work with representatives of industry, Federal agencies, consumer groups, and other interested parties on this policy statement" (Id.).

This issue of lender payments, or indirect fees, to mortgage brokers has proven particularly troublesome for industry and consumers alike. It has been the subject of litigation in more than 150 cases nationwide (see additional discussion below). To understand the issue and HUD's position regarding the legality of these payments requires background information concerning the nature of the services provided by mortgage brokers and their compensation, as well as the applicable legal requirements under RESPA.

During the last seven years, HUD has conducted three rulemakings respecting mortgage broker fees. These rulemakings first addressed definitional issues and issues concerning disclosure of payments to mortgage brokers in transactions covered under RESPA. (See 57 FR 49600 (November 2, 1992); 60 FR 47650 (September 13, 1995).) Most recently in a regulatory negotiation (see 60 FR 54794 (October 25, 1995) and 60 FR 63008 (December 8, 1995)) and then a proposed rule (62 FR 53912 (October 16, 1997)), HUD addressed the issue of the legality of payments to brokers under RESPA. In the latter, HUD proposed that payments from lenders to mortgage brokers be presumed legal if the mortgage

broker met certain specified conditions, including disclosing its role in the transaction and its total compensation through a binding contract with the borrower. This rulemaking is pending.

In July 1998, HUD and the Board of Governors of the Federal Reserve delivered to Congress a joint report containing legislative proposals to reform RESPA and the Truth in Lending Act. If the proposals in this reform package were to be adopted, the disclosure and legality issues raised herein would be resolved for any mortgage broker following certain of the proposed requirements, and consumers would be offered significant new protections.

B. Mortgage Brokerage Industry

When RESPA was enacted in 1974, single family mortgages were largely originated and held by savings and loans, commercial banks, and mortgage bankers. During the 1980's and 1990's, the rise of secondary mortgage market financing resulted in new wholesale and retail entities to compete with the traditional funding entities to provide mortgage financing. This made possible the origination of loans by retail entities that worked with prospective borrowers, collected application information, and otherwise processed the data required to complete the mortgage transaction. These retail entities generally operated with the intent of developing the origination package, and then immediately transmitting it to a wholesale lender who funded the loan. The rise in technology permitted much more effective and faster exchange of information and funds between originators and lenders for the retail transaction.

Entities that provide mortgage origination or retail services and that bring a borrower and a lender together to obtain a loan (usually without providing the funds for loans) are generally referred to as "mortgage brokers." These entities serve as intermediaries between the

consumer and the entity funding the loan, and currently initiate an estimated half of all home mortgages made each year in the United States. Mortgage brokers generally fit into two broad categories: those that hold themselves out as representing the borrower in shopping for a loan, and those that simply offer loans as do other retailers of loans. The first type may have an agency relationship the borrower and, in some states, may be found to owe a [*10081] responsibility to the borrower in connection with the agency representation. The second type, while not representing the borrower, may make loans available to consumers from any number of funding sources with which the mortgage broker has a business relationship.

Mortgage brokers provide various services in processing mortgage loans, such as filling out the application, ordering required reports and documents, counseling the borrower and participating in the loan closing. They may also offer goods and facilities, such as reports, equipment, and office space to carry out their functions. The level of services mortgage brokers provide in particular transactions depends on the level of difficulty involved in qualifying applicants for particular loan programs. For example, applicants have differences in credit ratings, employment status, levels of debt, or experience that will translate into various degrees of effort required for processing a loan. Also, the mortgage broker may be required to perform various levels of services under different servicing or processing arrangements with wholesale lenders.

Mortgage brokers vary in their methods of collecting compensation for their work in arranging, processing, and closing mortgage loans. In a given transaction, a broker may receive compensation directly from the borrower, indirectly in fees paid by the wholesaler or lender providing the mortgage loan funds, or through a combination of both.

Where a broker receives direct compensation from a borrower, the broker's fee is likely charged to the borrower at or before closing, as a percentage of the loan amount (e.g., 1% of the loan amount) and through direct fees (such as an application fee, document preparation fee, processing fee, etc.).

Brokers also may receive indirect compensation from lenders or wholesalers. Such indirect fees may be referred to as "back funded payments," "servicing release premiums," or "yield spread premiums." These indirect fees paid to mortgage brokers may be based upon the interest rate of each loan entered into by the broker with the borrower. These fees have been the subject of much contention and litigation. Another method of indirect compensation, also the subject of significant controversy and uncertainty, is "volume-based" compensation. This generally involves compensation to a mortgage broker by a lender based on the volume of loans that the mortgage broker delivers to the lender in a fixed period of time. The compensation may come in the form of: (1) a cash payment to the broker based on the amount of loans the broker delivers to the lender in excess of a "threshold" or "floor amount"; or (2) provision of a lower "start rate" (often called a discount) for such loans; the compensation to the broker results from the difference in yield between the "start rate" and the loan rate. Volume based compensation may be received at settlement or well after a particular loan has closed.

Payments to brokers by lenders, characterized as yield spread premiums, are based on the interest rate and points of the loan entered into as compared to the par rate offered by the lender to the mortgage broker for that particular loan (e.g., a loan of 8% and no points where the par rate is 7.50% will command a greater premium for the broker than a loan with a par rate of 7.75% and no points). n1 In determining the price of a loan, mortgage brokers rely on rate quotes issued by lenders, sometimes several times a day. When a lender

agrees to purchase a loan from a broker, the broker receives the then applicable pricing for the loan based on the difference between the rate reflected in the rate quote and the rate of the loan entered into by the borrower. In some cases, the broker can increase its revenues by arranging a loan with the consumer at a particular rate and then, based on market changes or other factors which decrease the par rate, increase his or her fees. Some consumers allege that the compensation system for brokers results in higher loan rates for borrowers and/or that this compensation system is illegal under RESPA.

n1 The term "par rate" refers to the rate offered to the broker (through the lender's price sheets) at which the lender will fund 100% of the loan with no premiums or discounts to the broker.

Lender payments to mortgage brokers may reduce the up-front costs to consumers. This allows consumers to obtain loans without paying direct fees themselves. n2 Where a broker is not compensated by the consumer through a direct fee, or is partially compensated through a direct fee, the interest rate of the loan is increased to compensate the broker or the fee is added to principal. In any of the compensation methods described, all costs are ultimately paid by the consumer, whether through direct fees or through the interest rate.

n2 In many instances, these loans are called "no cost" or "no fee" loans. This terminology, however, may prove confusing because in such cases the costs are still paid by the borrower through a higher interest rate on the loan or by adding fees to principal. HUD's regulations implementing RESPA use the name "no cost" or "no point" loans consistent with industry practice.

C. Coverage of This Policy Statement

HUD's RESPA rules, found at 24 CFR part 3500 (Regulation X), define a mortgage broker to be "a person

(not an employee or exclusive agent of a lender) who brings a borrower and lender together to obtain a federally-related mortgage loan, and who renders * * * 'settlement services'" (24 CFR 3500.2(b)). In table funding, mortgage brokers may process and close loans in their own names. However, at or about the time of settlement, they transfer these loans to the lender, and the lender simultaneously advances the monies to fund the loan. In transactions where mortgage brokers function as intermediaries, the broker also provides loan origination services, but the loan funds are provided by the lender and the loan is closed in the lender's name.

In other cases, mortgage brokers may originate and close loans in their own name using their own funds or warehouse lines of credit, and then sell the loans after settlement in the secondary market. In such transactions, mortgage brokers effectively act as lenders under HUD's RESPA rules. Accordingly, the transfer of the loan obligation by, and payment to, these brokers after the initial funding is outside of RESPA's coverage under the secondary market exemption, found at 24 CFR 3500.5(b)(7), which states that payments to and from other loan sources following settlement areexempt from disclosure requirements and Section 8 restrictions. HUD's rule provides that in determining what constitutes a *bona fide* transfer in the secondary market, HUD considers the real source of funding and the real interest of the funding lender. (24 CFR 3500.5(b)(7).)

Because this Statement of Policy focuses on the legality of lender payments to mortgage brokers intransactions subject to RESPA, the coverage of this statement is restricted to payments to mortgage brokers in table-funded and intermediary broker transactions. Lender payments to mortgage brokers where mortgage brokers initially fund the loan and then sell the loan after settlement are outside the coverage of thisstatement as

exempt from RESPA under the secondary market exemption.

D. RESPA and Its Legislative History

In enacting RESPA, Congress sought to protect the American home-buying public from unreasonably and unnecessarily inflated prices in the home purchasing process (S. Rep. No. 93-866 (1974) *reprinted in* 1974 [*10082] U.S.C.C.A.N. 6548). Section 2 of the Act provides:

"significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. * * * It is the purpose of this act to effect certain changes in the settlement process for residential real estate that will result — in more effective advance disclosure to home buyers and sellers of settlement costs; [and]

(2) In the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services. * * *" 12 U.S.C. 2601.

Section 4(a) of RESPA requires the Secretary to create a uniform settlement statement which "shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement" (12 U.S.C. 2603(a)).

Section 5(c) of RESPA requires the provision of a "good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary" (12 U.S.C. 2604(c)).

Section 8(a) of RESPA, prohibits any person from giving and any person from accepting any fee, kickback, or other thing of value pursuant to any agreement or

understanding that business shall be referred to any person. (See 12 U.S.C. 2607(a).) Section 8(b) also prohibits anyone from giving or accepting any portion, split, or percentage of any charge made or received for the rendering of a settlement service other than for services actually performed. (12 U.S.C. 2607(b).) Section 8(c) of RESPA provides, however, that nothing in Section 8 shall be construed as prohibiting the payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or services actually performed. (12 U.S.C. 2607(c)(2).)

Under Section 19 of RESPA, HUD is authorized to issue rules, establish exemptions, and make such interpretations as is necessary to implement the law. (12 U.S.C. 2618(a).)

RESPA's legislative history refers to HUD-VA Reports and subsequent hearings by the Housing Subcommittee as defining "major problem areas that [had to] be dealt with if settlement costs are to be kept within reasonable bounds." (S. Rep. No. 93-866, at 6547.) One "major problem area" identified was the "[a]busive and unreasonable practices within the real estate settlement process that increase settlement costs to home buyers without providing any real benefits to them." Another major concern was "[t]he lack of understanding on the part of most home buyers about the settlement process and its costs, which lack of understanding makes it difficult for a free market for settlement services to function at maximum efficiency."

The legislative history reveals that Congress intended RESPA to guard against these unreasonable and excessive settlement costs in two ways. Under Section 4, Congress sought to "mak[e] information on the settlement process available to home buyers in advance of settlement and requir[e] advance disclosures of settlement charges." (S. Rep. 93-866, at 6548.) The Senate Report explained that "home buyers who would otherwise shop around for settlement services, and thereby

reduce their overall settlement costs, are prevented from doing so because frequently they are not apprised of the costs of these services until the settlement date or are not aware of the nature of the settlement services that will be provided."

Under Section 8, Congress sought to eliminate what it termed "abusive practices" — kickbacks, referral fees, and unearned fees. In enacting these prohibitions, Congress intended that "the costs to the American home buying public will not be unreasonably or unnecessarily inflated." (S. Rep. 93-866 at 6548.) In describing the Section 8 provisions, the Senate Report explained that RESPA "is intended to prohibit all * * * referral fee arrangements whereby any payment is made or 'thing of value' is provided for the referral of real estate settlement business." (S. Rep. 93-866, at 6551.)

The legislative history adds that "[t]o the extent the payment is in excess of the reasonable value of the goods provided or services performed, the excess may be considered a kickback or referral fee proscribed by Section [8]." (S. Rep. 93-866, at 6551.) The Senate Report states that "reasonable payments in return for services actually performed or goods actually furnished" were not intended to be prohibited (Id). n3 It also provided that "[t]hose persons and companies that provide settlement services should therefore take measures to ensure that any payments they make or commissions they give are not out of line with the reasonable value of the services received." (*Id.*)

n3 One of the examples of abusive activities listed in the legislative history that RESPA was intended to remedy is "a title insurance company [that] may give 10% or more of the title insurance premium to an attorney who may perform no services for the title insurance company other than placing a telephone call to the company or filling out a simple application." (S. Rep. 93-866, at 6551.) Accordingly, where insufficient

services are provided, RESPA is intended to prohibit payment.

The Department has consistently held that the prohibitions under Section 8 of RESPA cover the activities of mortgage brokers, because RESPA applies to the origination, processing, and funding of a federally related mortgage loan. This became an issue when, in 1984, the 6th Circuit Court of Appeals held that in applying Section 8 as a criminal statute, the definition of settlement services did not clearly extend to the making of a mortgage loan. (*U.S.* versus *Graham Mortgage Corp.*, 740 F.2d 414 (6th Cir. 1984).) In 1992, Congress responded by amending RESPA to remove any doubt that, for purposes of RESPA, a settlement service includes the origination and making of a mortgage loan. (Section 908 of the Housing and Community Development Act of 1992 (Pub. L. 102-550, approved October 28, 1992; 104 Stat. 4413). At the same time, Congress also specifically made RESPA applicable to second mortgages and refinancings. (*Id.*)

E. HUD's RESPA Rules

On November 2, 1992 (57 FR 49600), the Department issued a major revision of Regulation X, the rule interpreting RESPA. The rule defined the term "mortgage broker" for the first time. Under the rule, mortgage brokers are required to disclose direct and indirect payments on the Good Faith Estimate (GFE) no later than 3 days after loan application. (See 24 CFR 3500.7(a) and (c).) Such disclosure must also be provided to consumers, as a final figure, at closing on the settlement statement. (24 CFR 3500.8; 24 CFR part 3500, Appendix A (Instructions for Filling Out the HUD-1 and HUD-1A).) On the GFE and the settlement statement, lender-paid mortgage broker fees must be shown as "Paid Outside of Closing" (P.O.C.), and not computed in arriving at totals. (See 24 CFR 3500.7(a)(2) and 24 CFR part 3500, Appendix A.) The 1992 rule treats mortgage brokers as settlement service

providers whose fees are disbursed at or before settlement, akin to title agents, attorneys, appraisers, etc., whose fees are subject to disclosure and otherwise subject to RESPA, including Section 8.

The 1992 rule did not explicitly take a position on whether yield spread premiums or any other named class of back-funded or indirect fees paid by lenders to brokers are *per se* legal or illegal. By illustration, codified as Illustrations of Requirements of RESPA, Fact Situations 5 and 12 in Appendix B [*10083] to 24 CFR part 3500, the 1992 rule specifically listed "servicing release premiums" and "yield spread premiums" as fees required to be itemized on the settlement statement. Although the 1992 rule specifically acknowledged the existence of such fees and provided illustrations of how they were to be denominated on HUD disclosure forms, this requirement was intended to ensure their disclosure, but not to create a presumption of *per se* legality or illegality.

The anti-kickback, anti-referral fee and unearned fee provisions of RESPA are implemented by 24 CFR 3500.14. Regulation X repeats the Section 8 prohibitions against compensation for the referral of settlement service business and for the giving or accepting of any portion, split or percentage of any charge other than for services actually rendered. (24 CFR 3500.14(c).) Regulation X provides that a charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates the unearned fee prohibition. (See 24 CFR 3500.14(c).) Moreover, 24 CFR 3500.14(g)(1)(iv) clarifies that Section 8 of RESPA permits "[a] payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed."

The Department's regulations provide, under 24 CFR 3500.14(g)(2), that:

The Department may investigate high prices to see if they are the result of a referral fee or a split of a fee. *If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided.* These facts may be used as evidence of a violation of section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation. The value of a referral (i.e., the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services. * * * (emphasis supplied).

In addition, Regulation X clarifies that "[w]hen a person in a position to refer settlement service business * * * receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person." (24 CFR 3500.14(g)(3).)

Since 1992, HUD has provided various interpretations and other issuances under these rules stating the Department's position that the legality of a payment to a mortgage broker is not premised on the name of the particular fee. Rather, HUD has consistently advised that the issue under RESPA is whether the compensation to a mortgage broker in covered transactions is reasonably related to the value of the goods or facilities actually furnished or services actually performed. If the compensation, or a portion thereof, is not reasonably related to the goods or facilities actually furnished or the services actually performed, there is a compensated referral or an unearned fee in violation of Section 8(a) or 8(b) of RESPA, whether the compensation is a direct or indirect payment or a combination thereof.

F. Recent HUD Rulemaking Efforts

The Department received comments on the 1992 rule's requirement that mortgage brokers disclose indirect payments from lenders on the GFE and the settlement statement. In response, the Department reviewed whether the disclosure of indirect or back-funded fees is necessary or in the borrower's interest and whether additional rulemaking was needed to clarify the legality of fees to mortgage brokers. Brokers had alleged that these disclosures were confusing to consumers and disadvantaged brokers as compared to other originators who were within the secondary market exemption and were not required to disclose their compensation for the subsequent sale of the loan. Consumer representatives said that consumers needed to understand the existence of indirect fees and whether brokers represented consumers in shopping for loans. On September 13, 1995, the Department issued a proposed rule (60 FR 47650) and in December 1995 through May 1996, embarked on a negotiated rulemaking on these subjects.

Although the negotiated rulemaking did not result in consensus, on October 16, 1997, HUD published a proposed rule (62 FR 53912) that was shaped by views from both industry and consumer representatives provided during the negotiated rulemaking (as well as by comments received from the September 13, 1995, proposed rule (60 FR 47650)). The 1997 proposed rule proposed a qualified "safe harbor" for payments to mortgage brokers under Section 8. Under the proposal, if a broker enters into a contract with consumers explaining the broker's functions (whether or not it represented the consumer) and the total compensation the broker would receive in the transaction, before the consumer applied for a loan, HUD would presume the broker fees, both direct and indirect, to be legal. The 1997 proposal also provided, however, that this qualified safe harbor would only be available to those payments that did not exceed a test, to be established in the rule-

making, to preclude unreasonable fees. This proposal was intended, among other things, to establish that yield spread premiums paid to brokers meeting the rule's requirements were presumed legal when brokers provided consumers with prescribed information concerning the functions and compensation of mortgage brokers. The Department has received over 9,000 comments in response to this proposed rule.

G. Litigation

During the last several years, more than 150 lawsuits have been brought seeking class action certification based in whole or in part on the theory that the making of indirect payments from lenders to mortgage brokers violates Section 8 of RESPA. In various cases, plaintiffs have argued that yield spread premiums or other denominated indirect payments to brokers, regardless of their amount, constitute prohibited referral fees under Section 8(a). These plaintiffs generally argue that yield spread premiums are payments based upon the broker's ability to deliver a loan that is above the par rate. Some lawsuits have alleged that such yield spread premiums or other indirect payments are a split of fees between the lender and the broker, or are simply unearned fees and, therefore, also violate Section 8(b) of RESPA. Other challenges rely, in part, on the alleged unreasonableness of brokers' fees. These complaints assert that under the RESPA regulations, payments must bear a reasonable relationship to the market value of the good or the service provided and that payments in excess of such amounts must be regarded as forbidden referral fees.

Many of the lawsuits involve allegations that consumers were not informed by mortgage brokers concerning the mortgage brokers' role and compensation. A common element in many allegations is that borrowers were not informed about the existence or the amount of the yield spread premiums paid to the mortgage broker, and the relationship of the yield spread premium to the direct

fees that the borrower paid. The facts in these cases suggest generally that even where there were proper disclosures on the GFE and the settlement statement, borrowers allege that they were unaware of, or did not understand, that a yield spread premium was tied to the interest rate they agreed to pay, and that they could have reduced this charge or their direct [*10084] payment to the broker either by further negotiation or by engaging in additional shopping among mortgage loan providers.

Courts have been split in their decisions on these cases. Some of the decisions have concluded that yield spread premiums may be prohibited referral fees or duplicative fees in contravention of Section 8 of RESPA under the specific facts of the case. Some have held that the permissibility of yield spread premiums must be based on an analysis of whether the premiums constitute a reasonable payment, either alone or in combination with any direct fee paid by the borrower, for either the goods, services or facilities actually furnished. Because some courts have found that this necessitates an individual analysis of the facts of each transaction, some courts have denied plaintiffs' requests for class action certification. Some courts have certified a class without reaching a conclusion on the RESPA issues. Others have held that yield spread premiums constitute valid consideration to the mortgage broker in exchange for the origination of the loan and the sale of the loan to the lender. These courts have found that the payment of yield spread premiums is one method among many of compensating the broker for the origination services rendered.

H. Reform

In July 1998, the Department and the Federal Reserve Board delivered a report to Congress recommending significant improvements to streamline and simplify current RESPA and Truth In Lending Act requirements. The Report proposed that along with a tighter and more enforceable scheme for providing consumers with esti-

mated costs for settlements, an exemption from Section 8's prohibitions should be established for those entities that offer a package of settlement services and a mortgage loan at a guaranteed price, rate and points for the package early in the consumer's process of shopping for a loan. Such an approach, which also includes other additional consumer protection recommendations, would largely resolve these issues for any mortgage broker who chooses to abide by the requirements of this exemption. The Report's consumer protection recommendations included, among other items, that Congress consider establishment of an unfair and deceptive acts and practices remedy.

Under the "packaging" proposal set forth in the Report, settlement costs would be controlled more effectively by market forces. Consumers would be better able to comparison-shop, thereby encouraging creditors and others to operate efficiently and pass along discounts and lower prices. In addition, the Report's recommendations would greatly simplify compliance for the industry and clarify legal uncertainties that create liability risks.

I. This Policy Statement

This policy statement provides HUD's views of the legality of fees to mortgage brokers from lenders under existing law. In accordance with the Conference Report, in developing this policy statement, HUD met with representatives of government agencies, as well as a broad range of consumer and industry groups, including the Office of Thrift Supervision, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Reserve Board, the National Association of Mortgage Brokers, the Mortgage Bankers Association of America, the American Bankers Association, the Consumer Mortgage Coalition, America's Community Bankers, the Consumer Bankers Association, the Independent Bankers Association of America, AARP, the

National Consumer Law Center, Consumers Union, and the National Association of Consumer Advocates.

II. RESPA Policy Statement 1999-1

A. Introduction

The Department hereby states its position on the legality of payments by lenders to mortgage brokers under the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*) (RESPA) and its implementing regulations at 24 CFR part 3500 (Regulation X). This Statement of Policy is issued pursuant to Section 19(a) of RESPA (12 U.S.C. 2617(a)) and 24 CFR 3500.4(a)(1)(ii). HUD is cognizant of the Conferees' statement in the Conference Report on the FY 1999 HUD Appropriations Act that "Congress never intended payments by lenders to mortgage brokers for goods or facilities actually furnished or for services actually performed to be violations of [Sections 8](a) or (b) (12 U.S.C. Sec. 2607) in its enactment of RESPA." (H. Rep. 105-769, at 260.) The Department is also cognizant of the congressional intent in enacting RESPA of protecting consumers from unnecessarily high settlement charges caused by abusive practices. (12 U.S.C. 2601.)

In transactions where lenders make payments to mortgage brokers, HUD does not consider such payments (i.e., yield spread premiums or any other class of named payments), to be illegal *per se*. HUD does not view the name of the payment as the appropriate issue under RESPA. HUD's position that lender payments to mortgage brokers are not illegal *per se* does not imply, however, that yield spread premiums are legal in individual cases or classes of transactions. The fees in cases or classes of transactions are illegal if they violate the prohibitions of Section 8 of RESPA.

~~In determining whether a payment from a lender~~ Under Section 8 of RESPA, 12 U.S.C. § 2607(c), the question is whether a lender payment to a mortgage broker is compensation for goods or facilities actually furnished,

or services actually provided. In determining whether a payment from a lender to a mortgage broker is for goods, services or facilities and therefore permissible under Section 8 of RESPA, ~~the~~ HUD apples a two-part test. The first question is whether goods or facilities were actually furnished or services were actually performed ~~for the compensation paid~~. The fact that goods or facilities have been actually furnished or that services have been actually performed by the mortgage broker does not by itself make the payment legal. The second question is whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed.

In applying this test, HUD believes that total compensation should be scrutinized to assure that it is reasonably related to goods, facilities, or services furnished or performed to determine whether it is legal under RESPA. Total compensation to a broker includes direct origination and other fees paid by the borrower, indirect fees, including those that are derived from the interest rate paid by the borrower, or a combination of some or all. The Department considers that higher interest rates alone cannot justify higher total fees to mortgage brokers. All fees will be scrutinized as part of total compensation to determine that total compensation is reasonably related to the goods or facilities actually furnished or services actually performed. HUD believes that total compensation should be carefully considered in relation to price structures and practices in similar transactions and in similar markets.

B. Scope

In light of 24 CFR §3500.5(b)(7), which exempts from RESPA coverage *bona fide* transfers of loan obligations in the secondary market, this policy statement encompasses only transactions where mortgage brokers are not the real source of funds (i.e., table-funded transactions or transactions involving "intermediary" brokers).

In table-funded transactions, the mortgage broker originates, processes and closes the loan in the broker's own name and, at or about the time of settlement, there is a simultaneous advance of the loan funds by the lender and an assignment of the loan to that lender. (See 24 CFR 3500.2 (Definition of "table funding").) Likewise, in transactions where [*10085] mortgage brokers are intermediaries, the broker provides loan origination services and the loan funds are provided by the lender; the loan, however, is closed in the lender's name.

C. ~~Payments~~ Broker Must ~~Be for~~ Provide Compensable Goods, Facilities or Services

In the determination of whether payments from lenders to mortgage brokers are permissible under Section 8 of RESPA, the threshold question is whether there were goods or facilities actually furnished or services actually performed ~~for the total compensation paid to the mortgage broker~~. In making the determination of whether compensable services are performed, HUD's letter to the Independent Bankers Association of America, dated February 14, 1995 (IBAA letter) may be useful. In that letter, HUD identified the following services normally performed in the origination of a loan:

(a) Taking information from the borrower and filling out the application; n4

n4 In a subsequent informal interpretation, dated June 20, 1995, HUD stated that the filling out of a mortgage loan application could be substituted by a comparable activity, such as the filling out of a borrower's worksheet.

(b) Analyzing the prospective borrower's income and debt and pre-qualifying the prospective borrower to determine the maximum mortgage that the prospective borrower can afford;

(c) Educating the prospective borrower in the home buying and financing process, advising the borrower

about the different types of loan products available, and demonstrating how closing costs and monthly payments could vary under each product;

(d) Collecting financial information (tax returns, bank statements) and other related documents that are part of the application process;

(e) Initiating/ordering VOEs (verifications of employment) and VODs (verifications of deposit);

(f) Initiating/ordering requests for mortgage and other loan verifications;

(g) Initiating/ordering appraisals;

(h) Initiating/ordering inspections or engineering reports;

(i) Providing disclosures (truth in lending, good faith estimate, others) to the borrower;

(j) Assisting the borrower in understanding and clearing credit problems;

(k) Maintaining regular contact with the borrower, realtors, lender, between application and closing to appraise them of the status of the application and gather any additional information as needed;

(l) Ordering legal documents;

(m) Determining whether the property was located in a flood zone or ordering such service; and

(n) Participating in the loan closing.

While this list does not exhaust all possible settlement services, and while the advent of computer technology has, in some cases, changed how a broker's settlement services are performed, HUD believes that the letter still represents a generally accurate description of the mortgage origination process. For other services to be acknowledged as compensable under RESPA, they should be identifiable and meaningful services akin to those identified in the IBAA letter including, for

example, the operation of a computer loan origination system (CLO) or an automated underwriting system (AUS).

The IBAA letter provided guidance on whether HUD would take an enforcement action under RESPA. In the context of the letter's particular facts and subject to the reasonableness test which is discussed below, HUD articulated that it generally would be satisfied that sufficient origination work was performed to justify compensation if it found that:

- The lender's agent or contractor took the application information (under item (a)); and
- The lender's agent or contractor performed at least five additional items on the list above.

In the letter and in the context of its facts, HUD also pointed out that it is concerned that a fee for steering a customer to a particular lender could be disguised as compensation for "counseling-type" activities. Therefore, the letter states that if an agent or contractor is relying on taking the application and performing only "counseling type" services — (b), (c), (d), (j), and (k) on the list above — to justify its fee, HUD would also look to see that meaningful counseling — not steering — is provided. In analyzing transactions addressed in the IBAA letter, HUD said it would be satisfied that no steering occurred if it found that:

- Counseling gave the borrower the opportunity to consider products from at least three different lenders;
- The entity performing the counseling would receive the same compensation regardless of which lender's products were ultimately selected; *and*
- Any payment made for the "counseling-type" services is reasonably related to the services performed and not based on the amount of loan business referred to a particular lender.

In examining services provided by mortgage brokers and payments to mortgage brokers, HUD will look at the types of origination services listed in the IBAA letter to help determine whether compensable services are performed. n5 However, the IBAA letter responded to a program where a relatively small fee was to be provided for limited services by lenders that were brokering loans. n6

n5 In the June 20, 1995 letter, the Department clarified that the counseling test in the IBAA letter would not apply if an entity performed only non-counseling services (a, e, f, g, h, i, l, m, n) or a mix of counseling and non-counseling services (but did not rely only on the five counseling services (b, c, d, j, and k)).

n6 In the particular program reviewed by HUD in the IBAA letter, the average total compensation for performing six of the origination services listed above was below $200.

Accordingly, the formulation in the IBAA letter of the number of origination services which may be required to be performed for compensation is not dispositive in analyzing more costly mortgage broker transactions where more comprehensive services are provided. The determinative test under RESPA is the relationship of the services, goods or facilities furnished to the total compensation received by the broker (discussed below). In addition to services, mortgage brokers may furnish goods or facilities to the lender. For example, appraisals, credit reports, and other documents required for a complete loan file may be regarded as goods, and a reasonable portion of the broker's retail or "store-front" operation may generally be regarded as a facility for which a lender may compensate a broker. However, while a broker may be compensated for goods or facilities actually furnished or services actually performed, the loan itself, which is arranged by the mortgage broker, cannot be regarded as a "good" that the broker may sell to the lender and that the lender may pay for

based upon the loan's yield's relation to market value, reasonable or otherwise. In other words, in the context of a non-secondary market mortgage broker transaction, under HUD's rules, it is not proper to argue that a loan is a "good," in the sense of an instrument bearing a particular yield, thus justifying any yield spread premium to the mortgage broker, however great, on the grounds that such yield spread premium is the "market value" of the good.

D. Compensation Must Be Reasonably Related to Value of Goods, Facilities or Services

The fact that goods or facilities have been actually furnished or that services have been actually performed by the mortgage broker, as described in the IBAA letter, does not by itself make a payment by a lender to a mortgage [*10086] broker legal. The next inquiry is whether the payment is reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed. Although RESPA is not a rate-making statute, HUD is authorized to ensure that payments from lenders to mortgage brokers are reasonably related to the value of the goods or facilities actually furnished or services actually performed, and are not compensation for the referrals of business, splits of fees or unearned fees.

In analyzing whether a particular payment or fee bears a reasonable relationship to the value of the goods or facilities actually furnished or services actually performed, HUD believes that payments must be commensurate with that amount normally charged for similar services, goods or facilities. This analysis requires careful consideration of fees paid in relation to price structures and practices in similar transactions and in similar markets. n7 If the payment or a portion thereof bears no reasonable relationship to the market value of the goods, facilities or services provided, the excess over the market rate may be used as evidence of a compensated referral or an unearned fee in violation of Section

8(a) or (b) of RESPA. (See 24 CFR 3500.14(g)(2).) Moreover, HUD also believes that the market price used to determine whether a particular payment meets the reasonableness test may not include a referral fee or unearned fee, because such fees are prohibited by RESPA. Congress was clear that for payments to be legal under Section 8, they must bear a reasonable relationship to the value received by the person or company making the payment. (S. Rep. 93-866, at 6551.)

n.7 HUD recognizes that settlement costs may vary in different markets. The cost of a specific service in Omaha, Nebraska, for example, may bear little resemblance to the cost of a similar service in Los Angeles, California.

The Department recognizes that some of the goods or facilities actually furnished or services actually performed by the broker in originating a loan are "for" the lender and other goods or facilities actually furnished or services actually performed are "for" the borrower. HUD does not believe that it is necessary or even feasible to identify or allocate which facilities, goods or services are performed or provided for the lender, for the consumer, or as a function of State or Federal law. All services, goods and facilities inure to the benefit of both the borrower and the lender in the sense that they make the loan transaction possible (e.g., an appraisal is necessary to assure that the lender has adequate security, as well as to advise the borrower of the value of the property and to complete the borrower's loan).

The consumer is ultimately purchasing the total loan and is ultimately paying for all the services needed to create the loan. All compensation to the broker either is paid by the borrower in the form of fees or points, directly or by addition to principal, or is derived from the interest rate of the loan paid by the borrower. Accordingly, in analyzing whether lender payments to mortgage brokers comport with the requirements of Section 8 of RESPA, HUD believes that the totality of

the compensation to the mortgage broker for the loan must be examined. For example, if the lender pays the mortgage broker $600 and the borrower pays the mortgage broker $500, the total compensation of $1,100 would be examined to determine whether it is reasonably related to the goods or facilities actually furnished or services actually performed by the broker.

Therefore, in applying this test, HUD believes that total compensation should be scrutinized to assure that it is reasonably related to goods, facilities, or services furnished or performed to determine whether total compensation is legal under RESPA. Total compensation to a broker includes direct origination and other fees paid by the borrower, indirect fees, including those that are derived from the interest rate paid by the borrower, or a combination of some or all. All payments, including payments based upon a percentage of the loan amount, are subject to the reasonableness test defined above. In applying this test, the Department considers that higher interest rates alone cannot justify higher total fees to mortgage brokers. All fees will be scrutinized as part of total compensation to determine that total compensation is reasonably related to the goods or facilities actually furnished or services actually performed.

In so-called "no-cost" loans, borrowers accept a higher interest rate in order to reduce direct fees, and the absence of direct payments to the mortgage broker is made up by higher indirect fees (e.g., yield spread premiums). Higher indirect fees in such arrangements are legal if, and only if, the total compensation is reasonably related to the goods or facilities actually furnished or services actually performed.

In determining whether the compensation paid to a mortgage broker is reasonably related to the goods or facilities actually furnished or services actually performed, HUD will consider all compensation, including any volume based compensation. In this analysis, there

may be no payments merely for referrals of business under Section 8 of RESPA. (See 24 CFR 3500.14.) n8

n8 The Department generally has held that when the payment is based on the volume or value of business transacted, it is evidence of an agreement for the referral of business (unless, for example, it is shown that payments are for legitimate business reasons unrelated to the value of the referrals). (See 24 CFR 3500.14(e).)

Under HUD's rules, when a person in a position to refer settlement service business receives a payment for providing additional settlement services as part of the transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by the person. (24 CFR 3500.14(g)(3).) While mortgage brokers may receive part of their compensation from a lender, where the lender payment duplicates direct compensation paid by the borrower for goods or facilities actually furnished or services actually performed, Section 8 is violated. In light of the fact that the borrower and the lender may both contribute to some items, HUD believes that it is best to evaluate seemingly duplicative fees by analyzing total compensation under the reasonableness test described above.

E. Information Provided to Borrower

Under current RESPA rules mortgage brokers are required to disclose estimated direct and indirect fees on the Good Faith Estimate (GFE) no later than 3 days after loan application. (See 24 CFR 3500.7(a) and (b).) Such disclosure must also be provided to consumers, as a final exact figure, at closing on the settlement statement. (24 CFR 3500.8; 24 CFR part 3500, AppendixA.) On the GFE and the settlement statement, lender payments to mortgage brokers must be shown as "Paid Outside of Closing" (P.O.C.), and are not computed in arriving at totals. (24 CFR 3500.7(a)(2).) The requirement that all fees be disclosed on the GFE is intended to assure that consumers are shown the full amount of

compensation to brokers and others early in the transaction.

The Department has always indicated that any fees charged in settlement transactions should be clearly disclosed so that the consumer can understand the nature and recipient of the payment. Code-like abbreviations like "YSP to DBG, POC", for instance, have been noted. n9 Also, the Department has seen [*10087] examples on the GFE and/or the settlement statement where the identity and/or purpose of the fees are not clearly disclosed.

n9 This is an example only. HUD recognizes that current practices may leave borrowers confused. However, the use of any particular terms, including abbreviations, may not, by itself, violate RESPA. Nevertheless, going forward, HUD recommends that the disclosures on the GFE and the settlement statement be as described in the text. HUD recognizes that system changes may require time for lenders and brokers to implement.

The Department considers unclear and confusing disclosures to be contrary to the statute's and the regulation's purposes of making RESPA-covered transactions understandable to the consumer. At a minimum, all fees to the mortgage broker are to be clearly labeled and properly estimated on the GFE. On the settlement statement, the name of the recipient of the fee (in this case, the mortgage broker) is to be clearly labeled and listed, and the fee received from a lender is to be clearly labeled and listed in the interest of clarity. For example, a fee would be appropriately disclosed as "Mortgage broker fee from lender to XYZ Corporation (P.O.C.)." In the interest of clarity, other fees or payments from the borrower to the mortgage broker should identify that they are mortgage broker fees from the borrower. n10

n10 HUD recognizes that current software may not currently accommodate these additional disclosures. Both industry and consumers would be better served if

these additional disclosures were included in future forms.

There is no requirement under existing law that consumers be fully informed of the broker's services and compensation prior to the GFE. Nevertheless, HUD believes that the broker should provide the consumer with information about the broker's services and compensation, and agreement by the consumer to the arrangement should occur as early as possible in the process. Mortgage brokers and lenders can improve their ability to demonstrate the reasonableness of their fees if the broker discloses the nature of the broker's services and the various methods of compensation at the time the consumer first discusses the possibility of a loan with the broker.

The legislative history makes clear that RESPA was not intended to be a rate-setting statute and that Congress instead favored a market-based approach. (S. Rep. No. 93-866 at 6546 (1974).) In making the determination of whether a payment is *bona fide* compensation for goods or facilities actually furnished or services actually performed, HUD has, in the past, indicated that it would examine whether the price paid for the goods, facilities or services is truly a market price; that is, if in an arm's length transaction a purchaser would buy the services at or near the amount charged. If the fee the consumer pays is disclosed and agreed to, along with its relationship to the interest rate and points for the loan and any lender-paid fees to the broker, a market price for the services, goods or facilities could be attained. HUD believes that for the market to work effectively, borrowers should be afforded a meaningful opportunity to select the most appropriate product and determine what price they are willing to pay for the loan based on disclosures which provide clear and understandable information.

The Department reiterates its long-standing view that disclosure alone does not make illegal fees legal under RESPA. On the other hand, while under current law,

pre-application disclosure to the consumer is not required, HUD believes that fuller information provided at the earliest possible moment in the shopping process would increase consumer satisfaction and reduce the possibility of misunderstanding.

HUD commends the National Association of Mortgage Brokers and the Mortgage Bankers Association of America for strongly suggesting that their members furnish consumers with a form describing the function of mortgage brokers and stating that a mortgage broker may receive a fee in the transaction from a lender.

Although this statement of policy does not mandate disclosures beyond those currently required by RESPA and Regulation X, the most effective approach to disclosure would allow a prospective borrower to properly evaluate the nature of the services and all costs for a broker transaction, and to agree to such services and costs before applying for a loan. Under such an approach, the broker would make the borrower aware of whether the broker is or is not serving as the consumer's agent to shop for a loan, and the total compensation to be paid to the mortgage broker, including the amounts of each of the fees making up that compensation. If indirect fees are paid, the consumer would be made aware of the amount of these fees and their relationship to direct fees and an increased interest rate. If the consumer may reduce the interest rate through increased fees or points, this option also would be explained. HUD recognizes that in many cases, the industry has not been using this approach because it has not been required. Moreover, new methods may require time to implement. HUD encourages these efforts going forward and believes that if these desirable disclosure practices were adhered to by all industry participants, the need for more prescriptive regulatory or legislative actions concerning this specific problem could be tempered or even made unnecessary.

While the Department is issuing this statement of policy to comply with a Congressional directive that HUD clarify its position on the legality of lender payments to mortgage brokers, HUD agrees with segments of the mortgage lending and settlement service industries and consumer representatives that legislation to improve RESPA is needed. HUD believes that broad legislative reform along the lines specified in the HUD/Federal Reserve Board Report remains the most effective way to resolve the difficulties and legal uncertainties under RESPA and TILA for industry and consumers alike. Statutory changes like those recommended in the Report would, if adopted, provide the most balanced approach to resolving these contentious issues by providing consumers with better and firmer information about the costs associated with home-secured credit transactions and providing creditors and mortgage brokers with clearer rules.

III. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this Amended Statement of Policy under Executive Order 12866, *Regulatory Planning and Review*. OMB determined that this Statement of Policy is a "significant regulatory action," as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the Statement of Policy subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the office of the Department's Rules Docket Clerk, Room 10276, 451 Seventh Street, SW, Washington, DC 20410-0500.

Dated: ~~February 22, 1999. William C. Apgar~~ July , 2001

John C. Weicher,

Assistant Secretary for Housing – Federal Housing Commissioner.

[FR Doc. ~~99-4921 Filed 2-26-99; 8:45 am] BILLING CODE 4210-27-P~~ Filed : : am]

----------COMPARISON OF FOOTNOTES----------

--FOOTNOTE 1–

HUD does not find it necessary or appropriate in issuing this amendment to revise the preamble to the Statement of Policy 1999-1, even though some purely historical facts recited in the preamble (such as the pendency of proposed rulemaking in this area) have since changed.

Preamble to Interim Rulemaking on Mortgage Broker Fee and Disclosure Agreement

This interim rulemaking addresses mortgage broker compensation. The Department of Housing and Urban Development has in the past issued various informal opinion letters and other guidance on this subject. Most recently, HUD addressed the legality of lender payments to mortgage brokers under Section 8 of the Real Estate Settlement Procedures Act (12 U.S.C. § 2607). Real Estate Settlement Procedures Act (RESPA) Amended Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers ("SOP 1999-1") [cite]. This rulemaking prospectively requires mortgage brokers to employ a new disclosure agreement to help eliminate consumer confusion over the amount, sources, and nature of mortgage broker compensation.

In the SOP 1999-1, HUD recognized the contours of the now existing disclosure obligations as follows:

> Under current RESPA rules mortgage brokers are required to disclose estimated direct and indirect fees on the Good Faith Estimate (GFE) no later than 3 days after loan application. (See 24 CFR 3500.7(a) and (b).) Such disclosure must also be provided to consumers, as a final exact figure, at closing on the settlement statement. (24 CFR 3500.8; 24 CFR part 3500, Appendix A.) On the GFE and the settlement statement, lender payments to mortgage brokers must be shown as "Paid Outside of Closing" (P.O.C.), and are not computed in arriving at totals. (24 CFR 3500.7(a)(2).) The requirement that all fees be disclosed on the GFE is intended to assure that consumers are shown the full amount of compensation to brokers and others early in the transaction.

64 Fed. Reg. 10086.

HUD also recognized that, while not presently required, additional disclosure of the nature, sources and

amounts of mortgage broker compensation would meaningfully improve the consumer's understanding of the payments received by the broker, and the consumer's ability to shop for alternatives. As the SOP 1999-1 stated:

> Although this statement of policy does not mandate disclosures beyond those currently required by RESPA and Regulation X, the most effective approach to disclosure would allow a prospective borrower to properly evaluate the nature of the services and all costs for a broker transaction, and to agree to such services and costs before applying for a loan. Under such an approach, the broker would make the borrower aware of whether the broker is or is not serving as the consumer' agent to shop for a loan, and the total compensation to be paid to the mortgage broker, including the amounts of each of the fees making up that compensation. If indirect fees are paid, the consumer would be made aware of the amount of these fees and their relationship to direct fees and an increased interest rate. If the consumer may reduce the interest rate through increased fees or points, this option also would be explained. HUD recognizes that in many cases, the industry has not been using this approach because it has not been required. Moreover, new methods may require time to implement. HUD encourages these efforts going forward and believes that if these desirable disclosure practices were adhered to by all industry participants, the need for more prescriptive regulatory or legislative actions concerning this specific problem could be tempered or even made unnecessary.

64 Fed. Reg. 10087.

HUD now believes that such an additional disclosure should be required on an industry-wide basis. The interim rulemaking requires mortgage brokers to enter into the Mortgage Broker Fee and Disclosure Agreement

with the consumer(s) within three days of taking an application. Compliance with this obligation, and performance of the Mortgage Broker Fee and Disclosure Agreement, shall render the mortgage broker compensation paid immune from liability under Section 8 of RESPA. The obligation to comply with the Mortgage Broker Fee and Disclosure Agreement rests solely with the mortgage broker, and no other entity shall be liable for any misrepresentation or non-performance of the brokers obligations under this agreement.

Mortgage Broker Fee and Disclosure Agreement

In the following: I = applicant; You = mortgage broker

Mortgage Broker Services. You are duly authorized and prepared to assist me in arranging mortgage financing for my home, and I engage you to provide such service. I understand that your services may include, but are not limited to the following:

- Taking my personal financial information and helping me complete my loan application
- Advising me about the different types of loan products available and demonstrating how closing costs and monthly payments could vary under each product
- Collecting financial information such as tax returns and bank statements that are part of the application process
- Initiating/ordering requests for mortgage and other loan verifications
- Initiating/ordering appraisals, inspections or engineering reports
- Providing me with required disclosures such as the truth-in-lending and good faith estimate disclosures
- Assisting me in understanding credit problems
- Performing such other services necessary to the completion of the loan application process

Amount of Broker Fee. I understand that, as compensation for your services, your total compensation from any and all sources will not exceed:

$_____ or _____ points (one point equals 1 percent of the original principal balance of the mortgage loan obtained).

Method of Broker Fee Payment. I understand that my choice as to how I want to structure my loan transaction will affect how your compensation is paid:

- *If I want to minimize my interest rate,* I may pay higher up-front points and fees and pay you directly.
- *If I want to minimize the cash I must bring to closing,* I may pay some or all of your compensation indirectly through a higher interest rate in which case the lender will pay you directly in whole or in part.

Nature of the Relationship. In connection with this Broker Fee and Disclosure Agreement and any mortgage loan, you are not acting as my agent, except where state law provides otherwise. Although you seek to assist me in meeting my financial needs, you do not distribute the products of all lenders or investors in the market and cannot guarantee the lowest price or best terms available in the market.

Termination. This agreement will continue until one of the following events occurs:

- I fail to receive loan approval;
- My loan closes;
- I terminate your services;
- You and I enter into a new Mortgage Broker Fee and Disclosure Agreement; or _____ days expire from the date of this agreement without any of the foregoing occurring.

Mortgage Broker Fee and Disclosure Acknowledgment

By signing below, we agree to the terms of this contract. Fees received under this agreement are legal and permissible under section 8 of the Real Estate Settlement Procedures Act and 24 CFR part 3500. The obligation to comply with the Mortgage Broker Fee and Disclosure Agreement rests solely with the mortgage broker, and no other entity shall be liable for any misrepresentation or non-performance of the brokers obligations under this agreement.

Signing this contract does not obligate me to obtain a mortgage loan through this mortgage broker, nor does it constitute mortgage loan approval.

* * Applicant _____ Date_____

* * Applicant _____ Date_____

_____ Date_____
Mortgage Broker Signature
Mortgage Broker License No. _____
(where applicable)

[Delivery. [Rule will provide that agreement must be delivered to borrower within three (3) business days of broker taking loan application.]

No. 02-1432

Supreme Court, U.S.
FILED
MAY 27 '03
OFFICE OF THE CLERK

In The Supreme Court of the United States

DANIEL HEIMMERMANN AND EMILY HEIMMERMANN, BOTH INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

FIRST UNION MORTGAGE CORPORATION,
Respondent.

BETH A. RICHARDSON AND PAMELA C. HIRSCH, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, DAVID L. HIRSCH,
Petitioners,

v.

BANKAMERICA CORPORATION, A DELAWARE CORPORATION, BANK OF AMERICA FSB, INC., A HAWAII CORPORATION, BANKAMERICA MORTGAGE, A DIVISION OF BANKAMERICA FSB, A HAWAII CORPORATION,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Whether the court of appeals erred by deferring to an agency's clarification of its own prior ambiguous Statement of Policy interpreting an ambiguous statutory provision, where such deference meant departing from an earlier decision of the court of appeals interpreting the prior Statement of Policy.

RULE 29.6
CORPORATE DISCLOSURE STATEMENTS

First Union Mortgage Corporation (now known as Wachovia Mortgage Corporation) is a wholly-owned subsidiary of Wachovia Bank, National Association, which is a wholly-owned subsidiary of Wachovia Corporation. Wachovia Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

BankAmerica Mortgage (operating now as Bank of America Mortgage) was a division of Bank of America, FSB, and Bank of America NT&SA (both of which have been succeeded by Bank of America, N.A.). Bank of America, FSB, was a wholly-owned subsidiary of BankAmerica Corporation (which has been succeeded by Bank of America Corporation). Bank of America Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Petitioners seek review of decisions in which the Eleventh Circuit deferred to a Statement of Policy by the United States Department of Housing and Urban Development (HUD) explaining how to determine whether a particular payment to a mortgage broker, known as a yield spread premium, is consistent with Sections 8(a) and 8(c) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(a) & (c). The court of appeals correctly concluded that those provisions are ambiguous with respect to the question and that HUD's interpretation is a reasonable one that is entitled to deference. Pet. App. 8a-11a. That ruling brought the Eleventh Circuit into agreement with the Eighth and Ninth Circuits. *See Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir.), *cert. denied*, 123 S. Ct. 344 (2002); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 994 (2003).

This Court denied petitions for writs of certiorari in both *Glover* and *Schuetz* that had sought review on the question of the proper interpretation of Sections 8(a) and 8(c) of RESPA with respect to the payment of yield spread premiums. Now that it is clear that the circuits are in accord on those issues, petitioners (represented by some of the same counsel who argued in *Glover* and *Schuetz* that the split in the circuits on the substance of RESPA warranted this Court's review) have shifted ground and seek to create discord where there is agreement. They contend that the question meriting the Court's review now is not the substantive issue, but whether the court of appeals was required to reject HUD's interpretation because an earlier Eleventh Circuit panel opinion understood an earlier HUD interpretation to mean something different. That issue does not warrant this Court's review. The court of appeals correctly applied the well-settled and uniformly-followed standards articulated by this Court in determining when to defer to an agency's interpretation of an ambiguous statutory provision.

STATEMENT

1. Statutory and Regulatory Framework

a. This case involves Sections 8(a) and 8(c) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2600 *et seq*. Section 8(a) of RESPA prohibits the giving or receiving of "any fee, kickback, or thing of value pursuant to any agreement or understanding * * * that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." *Id.* § 2607(a). To ensure that Section 8(a) was not read to prohibit legitimate fees, Congress qualified that prohibition with Section 8(c), which provides, in part, that "[n]othing in this section shall be construed as prohibiting * * * payment for goods or facilities actually furnished or for services actually performed." *Id.* § 2607(c)(2).

In Section 19(a) of RESPA, Congress delegated broad authority to the United States Department of Housing and Urban Development (HUD) to "prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of [RESPA]." *Id.* § 2617(a). In Section 19(b) of RESPA, Congress provided a safe harbor from liability under any of RESPA's prohibitions, including those found in Sections 8(a) and 8(c). It provides that a person is not liable under RESPA for "any act done or omitted in good faith in conformity with any rule, regulation, or interpretation" by HUD. *Id.* § 2617(b). In turn, HUD has provided that "a rule, regulation or interpretation" includes any "document that is published in the Federal Register by the Secretary and states that it is an 'interpretation,' 'interpretative rule,' 'commentary,' or a 'statement of policy' for purposes of Section 19(a)." 24 C.F.R. § 3500.4(a)(1)(ii).

b. At the time RESPA was enacted in 1974, a person who wanted to obtain a home mortgage loan was usually limited to obtaining a loan directly from a local bank or savings and loan. *See* Department of Housing and Urban Development, *Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender*

Payments to Mortgage Brokers; Final Rule, 64 Fed. Reg. 10,080, 10,080 (Mar. 1, 1999) ("1999 Statement of Policy"). Beginning in the 1980s, however, mortgage brokers began offering mortgage loans to home buyers. Mortgage brokers provide borrowers with access to a wide array of lenders and provide valuable services to both lenders and borrowers. Their "bricks and mortar" presence in a community gives lenders a low-cost way to extend their reach into new geographical markets and provides borrowers access to a more competitive marketplace. Mortgage brokers also furnish numerous services that make loan closings possible, such as creating a loan application, underwriting the loan package, and making certain the loan package is one a lender wants to fund and acquire. *Id.* at 10,080, 10,081, 10,085 (listing typical services provided). In exchange for its services, a mortgage broker is compensated by the borrower, by the lender, or by a combination of both. *Ibid.*

A borrower may choose to pay a mortgage broker's full compensation up front for facilitating the loan process. Many borrowers, however, do not have sufficient cash to cover a mortgage broker's full compensation, or do not wish to use their cash to pay the mortgage broker's compensation when that cost can be financed through the loan transaction. Such borrowers choose to finance some or all of that cost. In such circumstances, the mortgage broker's compensation can be paid by the lender. The lender, in turn, recovers this additional cost through a slightly higher interest rate, known as an "above par loan." *Id.* at 10,081 & n.2. When that occurs, the payment to the mortgage broker by the lender is referred to as a "yield spread premium."[1] HUD has explained that lender payments

[1] The range of pricing options available from a lender are published daily on rate sheets. These options include the amount the lender will pay a mortgage broker in connection with a particular loan product, credit category, loan amount, and particular rate of interest. The daily rate sheets measure the premium in relationship to the benchmark "par" interest rate. "The term 'par rate' refers to the rate offered to the broker (through the lender's price sheets) at which the

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to mortgage brokers, including yield spread premiums, "foster[ ] homeownership" by enabling borrowers to obtain loans without paying fees directly and thereby overcome "[o]ne of the primary barriers to homeownership" and refinancing – "the up front cash needed to obtain a mortgage." Department of Housing and Urban Development, *Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b); Final Rule*, 66 Fed. Reg. 53,052, 53,053, 53,054 (Oct. 18, 2001) ("2001 Statement of Policy").[2]

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lender will fund * * * of the loan with no premiums or discounts to the broker." *Id.* at 10,081 n.1. Rate sheets also typically offer "below par" loans, where the borrower must pay the lender additional money to lower the rate and the lender makes no contribution to the payment of the mortgage broker's compensation. *Ibid.*

Petitioners contend (Pet. 4) that the lenders' daily rate sheets are "presumably" kept secret to hide the yield spread premium. That is contradicted by the record below, which shows that the amount of the yield spread premium was revealed to each petitioner. Pet. App. 80a, 85a, 91a; *see also* note 5, *infra*. Indeed, each petitioner sought to define the class to be certified under Federal Rule of Civil Procedure 23(b)(3) as including only those loans where the mortgage loan documents reported that the mortgage broker was paid a yield spread premium. Pet. App. 14a-15a, 25a. In reality, lenders and mortgage brokers are prohibited from sharing rate sheets with consumers by federal law because the sheets do not satisfy federal Truth in Lending Act requirements regarding how interest rates and costs must be disclosed to borrowers. *See* 12 C.F.R. §§ 226.24(b), 226.2(a)(2).

[2] Another option available to some borrowers is to include the closing costs as part of the principal balance of the mortgage loan. As HUD has explained, however, including those costs in a mortgage loan is not an option for many borrowers because it would cause them to violate the maximum loan-to-value ratio required to qualify for the loan or to avoid costly mortgage insurance. *See* 66 Fed. Reg. at 53,054. In addition, a borrower might determine that he prefers to pay an incrementally higher interest rate (as the interest is tax-deductible) rather than increase his mortgage debt.

c. In 1998, concerned about a proliferation of lawsuits challenging the payment of yield spread premiums, Congress directed HUD to issue a policy statement to "clarify" HUD's position on the legality of lender payments to mortgage brokers under RESPA. H.R. Conf. Rep. No. 769, 105th Cong., 2d Sess. 260 (1998). Congress specified that HUD was to consult "with representatives of industry, federal agencies, consumer groups, and other interested parties," and then provide "guidance" to the courts in the form of a statement of policy to resolve any legal uncertainty about the practice. *Ibid.* HUD met with "representatives of government agencies, as well as a broad range of consumer and industry groups," and then issued in the Federal Register its 1999 Statement of Policy regarding "Lender Payments to Mortgage Brokers." 64 Fed. Reg. at 10,080, 10,084.

HUD explained in the 1999 Statement of Policy that it understood that yield spread premiums were calculated as a function of the interest rate and that it did not consider such payments from lenders "to be illegal *per se*." 64 Fed. Reg. at 10,084. HUD set forth a two-part test for determining the legality under Section 8 and its regulations of lender payments to mortgage brokers, including yield spread premiums. Under the HUD test, the threshold question is "whether there were goods or facilities actually furnished or services actually performed for the total compensation paid to the mortgage broker." *Id.* at 10,085. To facilitate that initial determination, HUD identified a typical set of compensable services and set out minimum requirements for the number and types of such services that must be performed in order to satisfy that initial step. *Ibid.* The second, and "determinative," question is whether the "total compensation" paid to the mortgage broker "is reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed." *Id.* at 10,085-10,086. The "total compensation" must be "commensurate with that amount normally charged for similar services" which "requires careful consideration of fees paid in relation to

price structures and practices in similar transactions and in similar markets." *Id.* at 10,086.

d. In 2001, the Eleventh Circuit issued its opinion in *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324 (11th Cir. 2001), *cert. denied*, 534 U.S. 1118 (2002), now known as *Culpepper III*, in which it addressed the question of the propriety of class action certification under Federal Rule of Civil Procedure 23(b)(3) in a case alleging that Section 8(a) of RESPA was violated when a particular mortgage broker had received payments directly from borrowers and also received a yield spread premium payment from a lender. 253 F.3d at 1326. The court reasoned that, in order to answer the Rule 23(b)(3) inquiry whether "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," it had "to settle on a rule of liability under § 8(a) and (c)" of RESPA. *Id.* at 1327-1328.

The court looked to HUD's 1999 Statement of Policy, which it found to be "ambiguous" with regard to its test for RESPA liability that was "the core of the class-certification dispute here." *Id.* at 1327. The court carefully reviewed the interpretations of that Statement of Policy proffered by the plaintiffs and by the defendant in that case. The court ultimately adopted the plaintiffs' construction of HUD's 1999 Statement of Policy. The court of appeals held that lender payments to mortgage brokers could be presumed to violate RESPA to the extent that the payments, analyzed in isolation, were calculated by a lender based on the interest rate on a rate sheet, rather than negotiated on a loan-by-loan basis. *See id.* at 1329-1332. Because that rule of liability did not require individualized assessments of what services were provided to each member of the class, the court concluded that class certification was appropriate. *Ibid.*[3]

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[3] *Culpepper III* also referred to that court's decisions in the case on an earlier appeal. In *Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692 (11th Cir.) (*Culpepper I*), *clarified on reh'g*, 144 F.3d 717 (1998)

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e. Following the *Culpepper III* decision, HUD issued a second RESPA Statement of Policy, entitled, in relevant part, "Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers." 66 Fed. Reg. at 53,052. HUD was concerned that *Culpepper III* would eliminate lender payments that foster homeownership for those otherwise unable to afford home financing. *Id.* at 53,054. HUD explained that this 2001 Statement of Policy's discussion of yield spread premiums and Section 8(a) was necessary to "clarify" and "eliminate any ambiguity" in its 1999 Statement of Policy. *Id.* at 53,052, 53,053. HUD explained in greater detail how yield spread premiums are necessary to enable certain borrowers to afford a home mortgage and to offer all borrowers additional financing options. *Id.* at 53,054. HUD also emphasized that it had "recognized the utility of yield spread premiums in regulations issued prior to the 1999 Statement of Policy," and pointed to regulations it had promulgated as early as 1989 and 1992. *Ibid.*

HUD's 2001 Statement of Policy indicated that its 1999 Statement of Policy had been misunderstood by the court in *Culpepper III* because *Culpepper III* focused solely on the method by which the yield spread premium is calculated (*i.e.*, that it is connected to the interest rate). HUD rejected that analysis, explaining that even where used to pay some or all of a mortgage broker's compensation,

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(*Culpepper II*), the court reversed the district court's grant of summary judgment to the defendants based on the court of appeals' conclusion that a yield spread premium could be viewed as a referral fee proscribed by Section 8(a). Noting that "the holding here is highly dependent upon the facts of this financial transaction," 132 F.3d at 697 n.5, the court remanded for further proceedings. On a petition for rehearing, the court clarified that yield spread premium payments "can in certain circumstances" be lawful under RESPA and that "[t]he only issue decided" in the *Culpepper I* opinion "was whether as a matter of law [the mortgage broker] had proved in the instant record that this yield spread premium for this table-funded loan was a payment for goods or services and therefore not a prohibited referral fee." *Culpepper II*, 144 F.3d at 718.

a yield spread premium (like any similar finance mechanism) is available to pay a mortgage broker's compensation precisely because the lender is charging additional interest. *Ibid.* HUD clarified that its two-part test did not support the court's view "that a yield spread premium can be presumed to be a referral fee based solely upon the fact that the lender pays the mortgage broker a yield spread premium that is based upon a rate sheet, or because the lender does not have specific knowledge of what services the broker has performed." *Id.* at 53,055. Regarding the latter point, HUD noted that lenders typically know the mortgage broker has performed an array of valuable services because of industry practice and underwriting standards, as well as the large volume of documentation they have received from the mortgage broker. *Ibid.* Regarding the court of appeals' focus on the calculation and rate sheet, HUD explained that, in order to determine "whether a yield spread premium was for goods, facilities or services under the first part of the HUD test," it is necessary to look beyond a rate sheet to the individual transaction and what was provided by the mortgage broker and what was paid. *Ibid.* HUD emphasized that reliance on a rate sheet "does not indicate whether a particular yield spread premium is a payment for * * * services." *Ibid.* HUD thus left no doubt that, under its interpretation of Section 8(a) of RESPA, "[t]he legality of any yield spread premium can only be evaluated in the context of the test HUD established and the specific factual circumstances applicable to each transaction in which a yield spread premium is used." *Id.* at 53,054.[4]

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[4] HUD's interpretation is consistent with the view of the vast majority of district courts that have correctly determined the appropriate test for liability under Section 8(a) both prior to and after the issuance of HUD's 1999 Statement of Policy. *See, e.g., Schmitz v. Aegis Mortgage Corp.*, No. 97-2142, 1998 U.S. Dist. LEXIS 22736, at *10-*11 (D. Minn. Aug. 3, 1998) (so holding and collecting cases).

2. Proceedings Below

a. District Court

i. Petitioners Daniel and Emily Heimmermann were interested in buying their first home, but had little money for a down payment and closing costs. They worked with a mortgage broker to obtain a mortgage with low up front costs. Based on a wide variety of factors, the mortgage broker elected to obtain that loan for the borrowers from respondent First Union Mortgage Corporation. At the time of settlement, the mortgage broker was paid a yield spread premium by First Union Mortgage Corporation. The Heimmermanns were put on plain notice in the contract with their mortgage broker, as well as in the mortgage documents presented to them at closing, of the lender's payment to the mortgage broker. Pet. App. 80a; No. 99-14066 C.A. Supp. Rec. Tab 47, Exh. E ("I/We understand and agree that [the mortgage broker] will perform a good and valuable service and may be compensated accordingly. This compensation may or may not be in the form of *** a yield spread premium paid by the investor purchasing the loan.").

The Heimmermanns later filed suit in the United States District Court for the Northern District of Alabama against First Union Mortgage Corporation, claiming that the yield spread premium payment violated Section 8(a) of RESPA. Pet. App. 14a-15a. The Heimmermanns filed a motion for certification of a plaintiff class. The district court granted the motion, finding that common questions of fact predominated. *Id.* at 17a-21a.

ii. Petitioner Beth Richardson and petitioners Pamela and David Hirsch each used the services of a mortgage broker to obtain a home mortgage loan from respondents BankAmerica Corporation, Bank of America FSB, and BankAmerica Mortgage (BankAmerica). Pet. App. 24a-25a. At the time of settlement for each of their

home purchases, the mortgage broker was paid a yield spread premium by BankAmerica. Richardson and the Hirschs were put on plain notice of that payment. *Id.* at 91a, 85a.[5]

Richardson and the Hirschs later filed separate lawsuits in two different federal district courts in Georgia against BankAmerica, claiming that the yield spread premium payment to their mortgage brokers violated Section 8(a) of RESPA. Pet. App. 24a-25a. The cases were consolidated and the district court denied plaintiffs' motion for certification of a class in both suits. *Id.* at 24a. It concluded that class certification was not appropriate because individual factual questions would predominate over any questions common to the proposed class. *Id.* at 26a-27a.[6]

b. Court of Appeals

i. The court of appeals reversed the district court's order granting class certification in the *Heimmermann* case. Pet. App. 1a-11a. The court ruled that the district court had applied the wrong legal standard when it certified the class, and that the court should defer to HUD's interpretation of Section 8(a) set forth in its 2001

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[5] Contrary to petitioners' suggestion (Pet. 4-5 & n.5), the yield spread premium was disclosed to petitioner Richardson on Line 811 of the settlement statement received at closing in the manner mandated by HUD and BankAmerica policies. *See* App., *infra*, 6a n.8. For a discussion of other factual inaccuracies that have been suggested by petitioners, see No. 99-11554 Resp. C.A. Br. 7-10, 12, 17-20.

[6] In March 2000, the district court entered summary judgment for BankAmerica on the Hirschs' individual claims, holding that they had failed to demonstrate a genuine issue of fact as to the mortgage broker's actual provision of valuable goods and services or the reasonableness of the compensation for those services. The district court also ruled, in the alternative, that the suit was barred by RESPA's one-year statute of limitations. On April 23, 2003, the court of appeals affirmed the district court's ruling on the merits. *See* App., *infra*, 1a-7a. The Hirschs' petition for rehearing and rehearing *en banc* is currently pending.

Statement of Policy. In reaching that conclusion, the court expressly recognized that "[n]o deference is to be given to an agency interpretation that is at odds with the plain meaning of the statute being interpreted." Pet. App. 5a (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The court explained, however, that "RESPA does not, by its plain language, speak to the standard for determining whether the payment of a [yield spread premium] violates the Act." *Ibid.* The court of appeals then held that HUD's 2001 Statement of Policy interpreting Section 8(a) was "entitled to deference as an interpretation of RESPA." *Id.* at 9a n.7; *id.* at 5a ("plain language of RESPA does not prevent [court] from giving deference to the 2001 [Statement of Policy]"). The court also noted that both the Eighth and Ninth Circuits had concluded that the 2001 Statement of Policy "is not inconsistent with the plain language of [Section 8(a) of] RESPA" and that HUD's two-part test set forth in its 2001 Statement of Policy "is fully consistent with RESPA." *Id.* at 5a n.5 (citing *Glover v. Standard Fed. Bank*, 283 F.3d 953, 963-965 (8th Cir.), *cert. denied*, 123 S. Ct. 344 (2002); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 994 (2003)).

The court of appeals rejected petitioners' various arguments as to why it should not apply HUD's 2001 Statement of Policy to the case. Pet. App. 3a-11a. The court emphasized that the 2001 Statement of Policy did not create a new rule, "but instead only clarified the interpretation of RESPA" found in HUD's 1999 Statement of Policy. *Id.* at 4a. The court also noted that Congress had included in Section 19(a) of RESPA, 12 U.S.C. § 2617(a), "an express delegation of congressional authority" to HUD to issue "interpretations" of ambiguous provisions of RESPA, and that HUD had expressly invoked that authority in issuing the 2001 Statement of Policy interpreting Section 8(a). Pet. App. 6a-7a. The court agreed with the Ninth Circuit's ruling in *Schuetz* that because Section 8(a) was ambiguous with respect to the question at issue, *Chevron* deference was warranted. *Id.* at 9a & n.7. The court also expressly found that HUD's 2001 Statement of Policy is not inconsistent

with the agency's 1999 Statement of Policy or prior agency guidance on the issue, *see id.* at 5a, 7a-9a, and that the other administrative materials cited by petitioners merely "reflect the ambiguity [the court] saw in the 1999 [Statement of Policy]." *Id.* at 7a.

Finally, the court of appeals directly addressed its decision in *Culpepper III* on which petitioners relied, and which was decided by the same panel of judges as the instant case. The court recognized that HUD's clarification in its 2001 Statement of Policy "compels a different result in this case than the result in *Culpepper III*." Pet. App. 9a. The court explicitly held that it was appropriate to defer to the clarification in HUD's 2001 Statement of Policy notwithstanding that such deference would, "in effect, overrule the holding of *Culpepper III*," *ibid.*, because, in reaching its holding in *Culpepper III*, the court of appeals had not "purport[ed] to rely squarely upon the plain language of Section 8 of RESPA, but rather upon an *interpretation* of RESPA's language and of the 'ambiguous' 1999 [Statement of Policy]." *Id.* at 5a; *see id.* at 3a (noting that its "ruling in *Culpepper III* had relied heavily on the 1999 [Statement of Policy]," which was "'ambiguous' and subject to different interpretations"). The court recognized that "[t]he resolution of ambiguity in a statutory text is often more a question of policy than of law," and that a court's preference for a different interpretation "is not enough to deny deference to the agency interpretation." *Id.* at 8a.

Because the court of appeals' adoption of HUD's two-part test meant that individualized assessments are required of what services were provided to a borrower and whether the total amount of mortgage broker compensation was reasonable in the light of the circumstances of a particular loan, the court concluded that class certification under Rule 23(b) was error. Pet. App. 10a-11a. Petitioners' petition for rehearing *en banc* was denied without dissent. *Id.* at 29a-30a.

ii. In a separate *per curiam* opinion by the same panel of judges, the court affirmed the district court's

denial of class certification in the suits brought by petitioners Richardson and the Hirschs, citing its *Heimmermann* opinion. Pet. App. 12a-13a. Petitioners' petition for rehearing *en banc* was denied without dissent. *Id.* at 31a-32a.

SUMMARY OF ARGUMENT

Joining the Eighth and Ninth Circuits, the Eleventh Circuit properly determined in these cases that Sections 8(a) and 8(c) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(a) & (c), are ambiguous with respect to the question of how yield spread premium payments by lenders to mortgage brokers are to be treated and that the interpretation promulgated by the United States Department of Housing and Urban Development (HUD) in its 2001 Statement of Policy is a reasonable one that is entitled to deference. *See* Pet. App. 8a-11a. Plaintiffs in the cases from both the Eighth and Ninth Circuits already sought this Court's review of that issue. *See Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir.), *cert. denied*, 123 S. Ct. 344 (2002); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 994 (2003). The Court denied review in both cases, and there is no reason for a different result here.

A. In order to overcome that obstacle to review by this Court, petitioners attempt to shift ground, claiming that the decisions below, which aligned the court of appeals' holding on the meaning of Sections 8(a) and 8(c) of RESPA with the holdings of the other circuits, at the same time created a circuit split on a question of administrative deference. Petitioners claim that review by this Court is warranted because the decisions below conflict with decisions by this Court and other circuits that have declined to defer to an agency interpretation that would overrule a statutory interpretation precedent. Pet. i; *id.* at 12-26. The decisions on which petitioners rely, however, all involved prior judicial determinations of the clear meaning of the relevant statutory provisions. Here, by contrast, the

court of appeals deferred to a clarifying interpretation by HUD of Sections 8(a) and 8(c) of RESPA, statutory provisions that the court (and every other court of appeals to consider the matter) has found to be ambiguous with respect to the question at issue.

B. Petitioners also appear to challenge the court of appeals' own characterization of the basis for its earlier panel decision, suggesting that the earlier decision was based on the clear meaning of the statute, despite the court of appeals' express statements to the contrary. Pet. 15-16. That challenge is not worthy of this Court's review, particularly where the same panel of judges who decided the instant cases issued the earlier decision and the full court of appeals had an opportunity to vote on two petitions for rehearing *en banc* and neither petition garnered a single vote. Pet. App. 29a-30a, 31a-32a. In any event, even if there were improper reasoning in the decision below, the erroneous reasoning of an opinion does not, alone, warrant exercise of this Court's review. *See Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956) (this Court "reviews judgments, not statements in opinions").

The court of appeals' deference to HUD's clarified interpretation was wholly appropriate because the court found it to be a reasonable interpretation of an ambiguous statutory provision. Even if the court's deference meant that it was adopting a different agency interpretation than the court had adopted in its earlier decision, that deference would be consistent with the Court's repeated recognition that, when provisions such as Sections 8(a) and 8(c) are ambiguous with respect to the question at issue, an agency may adopt different interpretations over time and each agency interpretation is entitled to deference and should be sustained so long as it is reasonable. *See, e.g.*, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417-418 (1993).

C. To the extent the petition could be construed to seek review of the question whether the agency's interpretation warrants administrative deference by the courts,

that issue is not fairly encompassed within the question presented and, in any event, does not merit review because the court of appeals' holding is correct and consistent with the result reached by the other circuits that have addressed the question. *See Glover*, 283 F.3d 953; *Schuetz*, 292 F.3d 1004; Pet. 11 (acknowledging agreement among circuits).

Finally, petitioners' claim that the decisions below conflict with *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002), *pet. for cert. filed*, No. 02-1430 (Mar. 26, 2003), is incorrect. That case, involving a different provision of RESPA, declined to defer to a different portion of HUD's 2001 Statement of Policy after determining that the statutory provision at issue in that case is unambiguous and thus does not require recourse to agency interpretation to determine its meaning.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Decisions Below Are Not Contrary To This Court's Decisions Involving Judicial Readings Of Unambiguous Statutes

1. The decisions below are not contrary to this Court's precedents. Petitioners' reliance (Pet. 12-16) on *Neal v. United States*, 516 U.S. 284 (1996), *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *Maislin Industries, Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), to claim otherwise is misplaced. In those cases, the Court refused to defer to a changed agency interpretation because it was inconsistent with the Court's prior determination of the relevant "statute's clear meaning." *Maislin*, 497 U.S. at 131 (quoted in *Lechmere*, 502 U.S. at 536-537, and cited in *Neal*, 516 U.S. at 295). The Court rejected the subsequent agency interpretations of the statutes because the Court's prior decisions addressing the question of statutory interpretation had previously found no ambiguity in the statutes with respect to the specific issue. Those decisions are consistent with the recognized limitation on administrative deference under *Chevron*, because "[i]f the

intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843.

Specifically, in *Neal*, the Court rejected an agency interpretation that would have required overruling *Chapman v. United States*, 500 U.S. 453 (1991), which had interpreted a statute based on the "ordinary meaning" of the statute's terms. *Neal*, 516 U.S. at 289; *see also Chapman*, 500 U.S. at 463-464 (relying on a "straightforward reading" of the text and structure that did not leave the Court "with an ambiguous statute"). In *Lechmere*, the Court explained that it was rejecting the agency's current interpretation because the Court's prior decision had determined the clear meaning of the statute and thus had concluded, "in *Chevron* terms," that the statute "speaks to the issue." 502 U.S. at 537. And in *Maislin*, likewise, the Court rejected the agency's claim to *Chevron* deference on the ground that the agency's interpretation "permitted the very price discrimination that the Act *by its terms* seeks to prevent." 497 U.S. at 130 (emphasis added); *see also id.* at 136 (Scalia, J., concurring).

Chevron makes equally clear, however, that if a "statute is silent or ambiguous with respect to the relevant issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Because "the resolution of ambiguity in a statutory context is often more a question of policy than of law," *Pauley v. BethEnergy Mines, Inc.*, 501 U.S 680, 696 (1991), the agency has the discretion to alter its interpretation of the ambiguous terms over time. *Chevron* expressly rejected the authority of a court to adopt a "static judicial definition" of a statutory term once it determined "that Congress itself had not commanded that definition." 467 U.S. at 842; *see also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (a change in position "is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency").

Although petitioners attempt to bring the decisions below within the reach of the *Neal* rule, they can only do so by mischaracterizing the reasoning and holding of the court of appeals.[7]

2. Petitioners assert that the court of appeals below held that it was required to overrule circuit precedent that was based on the "clear language * * * of the statute," Pet. i; *see also* Pet. 19-27, because it had to defer to a newly promulgated agency interpretation of a statute. In the instant cases, however, the court of appeals determined that the relevant statutory provisions – Sections 8(a) and 8(c) of RESPA – have no "*clear meaning*" with respect to the question at issue. Pet. App. 9a (quoting *Lechmere*, 502 U.S. at 536-537). The court found the statute is ambiguous, and does not provide any guidance on how the prohibition contained in Section 8(a), 12 U.S.C. § 2607(a), is to be reconciled with the savings language in Section 8(c), 12 U.S.C. § 2607(c), with regard to payments in the mortgage broker industry, such as yield spread premiums, that developed years after the enactment of the statute. Thus, the court of appeals properly deferred to HUD's 2001 Statement of Policy clarifying its 1999 Statement of Policy that interpreted the ambiguous Sections 8(a) and 8(c), because the court found HUD's interpretation, as clarified, to be a reasonable interpretation. Pet. App. 8a-9a.

Petitioners argue (Pet. 15-16) that the court of appeals' earlier decision in *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324 (11th Cir. 2001), *cert. denied*, 534 U.S. 1118 (2002) (*Culpepper III*), interpreting Section 8(a) embodied a holding that the statutory text was clear and that its reading of the statute was the *only* proper reading. The panel below, composed of the same members of the

[7] Furthermore, it is not clear that the *Neal* rule should even apply to the decision by a court of appeals whether, or through what procedure, to depart from one of its earlier decisions, because that question normally is left to each court of appeals to decide. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

court who decided *Culpepper III*, and including one member of the panel that decided the earlier *Culpepper* decisions, did not read that decision in that manner. Instead, the court of appeals made clear that its earlier decisions did "not purport to rely squarely upon the plain language of Section 8 of RESPA." Pet. App. 5a. At no point in *Culpepper III* (or in the earlier *Culpepper* decisions) did the court of appeals purport to determine that Section 8(a) was unambiguous. Indeed, the court of appeals already had concluded in *Culpepper III* that RESPA was ambiguous with respect to the question at issue and had thus focused on the parties' arguments regarding the agency's 1999 Statement of Policy. That conclusion about Sections 8(a) and 8(c) being ambiguous on this issue is consistent with every other court of appeals that has addressed the matter. *See Glover*, 283 F.3d at 961; *Schuetz*, 292 F.3d at 1012; *see also O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 739 (5th Cir. 2003).[8]

Petitioners claim that the court of appeals misread its own prior decisions in *Culpepper*. Pet. 15 (characterizing court of appeals' decision as "simply mumbo jumbo"). But the best interpreter of what an Eleventh Circuit opinion means is, of course, the Eleventh Circuit. *Cf. Fiore v. White*, 531 U.S. 225 (2001) (accepting Pennsylvania Supreme Court's explanation of what its earlier opinion meant). To the extent further confirmation is required, it is notable that, even prior to the Eleventh Circuit decisions under review here, the Eighth Circuit had read the

[8] Petitioners do not appear to argue that the court of appeals' conclusion that Sections 8(a) and 8(c) are ambiguous with respect to the question at issue is wrong. They appear to argue (Pet. 22 n.18) only that the court of appeals had previously held to the contrary and erred by reaching a different conclusion without rehearing the case *en banc*. We note that this Court has twice denied petitions for certiorari that have sought review of rulings that deferred to HUD's interpretation and had correctly found Sections 8(a) and 8(c) to be ambiguous with respect to the question at issue. *See* pages 22-23, *infra*.

Eleventh Circuit's *Culpepper* decisions in the same manner. *See Glover*, 283 F.3d at 964 n.9 ("The Eleventh Circuit appears * * * to have given at least some deference to HUD policy pronouncements."); *see also O'Sullivan*, 319 F.3d at 740 ("From the 1999 Policy Statement's two-part test, *Culpepper* interpreted the term 'for the compensation paid' as requiring the defendants to tie the disputed fee to specific goods or services provided by the broker."). Thus there is no basis to impugn the Eleventh Circuit's description of its own prior decisions.

Petitioners contend (Pet. 24, 27) that, because the court of appeals cited its decision in *Satellite Broadcasting and Communications Ass'n of America v. Oman*, 17 F.3d 344 (11th Cir. 1994), the court of appeals must have overridden circuit precedent that had previously determined that a statute had a clear meaning. But *Satellite Broadcasting* did not involve reliance on an agency interpretation to overrule a prior precedent regarding the clear meaning of a statute. The court there explained that its earlier decision, made in the absence of any regulation, had relied "upon inferences drawn from the statutory scheme and upon [its] policy determination" to conclude that satellite carriers were "cable systems" under the pertinent statute. *Id.* at 348. The court explained that, because it had not rested its decision "upon the statute's 'clear meaning,'" it was "not precluded from revisiting [its] initial interpretation of the regulatory scheme" in light of new regulations. *Ibid.* (quoting *Lechmere*, 502 U.S. at 536-537 (quoting *Maislin*, 497 U.S. at 130)). Thus, the court of appeals below correctly cited *Satellite Broadcasting* to support its determination that deference was due here. Pet. App. 9a.[9]

[9] Indeed, although petitioners claim (Pet. 24) that *Satellite Broadcasting* embodies a "general rule" that courts must "overrule a statutory interpretation decision in light of a subsequently issued agency interpretation," the Hirsch petitioners are currently arguing to the Eleventh Circuit, in their pending petition for rehearing *en banc*

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Finally, the Heimmermann petitioners argued in their petition for rehearing *en banc* that the panel below mischaracterized the prior *Culpepper* decisions. *See* No. 99-14066 Pet. for Reh'g *En Banc* 11-14. No member of the court of appeals voted for rehearing *en banc*. Pet. App. 29a-30a; *see also id.* at 31a-32a (no member voting for rehearing *en banc* from the class action decision involving Richardson and the Hirschs). The full court of appeals' willingness to permit the decisions below to take effect suggests that no member of that court believed that the case posed a threat to the uniformity of the court's decisions. *Cf.* Fed. R. App. P. 35(a)(1) (no *en banc* rehearing unless "en banc consideration is necessary to secure or maintain uniformity of the court's decisions"). There is thus no reason for this Court to intervene in order to determine whether the court of appeals properly construed its own precedents. *Cf. Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("[D]oubt about the respect to be accorded to a previous decision of a different panel should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification. It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

B. There Is No Disagreement Among The Courts Of Appeals Regarding Whether A Court Should Defer To A Clarifying Agency Interpretation Of An Ambiguous Statutory Provision That Departs From A Prior Interpretation

Petitioners have not identified any division in the circuits on the appropriate judicial treatment of clarifying guidance by an agency charged with issuing regulations

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from the panel opinion affirming the dismissal of their individual claims (*see* note 6, *supra*), that *Satellite Broadcasting* "does not support the panel's overruling of *Culpepper III*" because, in *Satellite Broadcasting*, the agency was simply "engaging in the kind of administrative action normally associated with *Chevron* deference – construing a term in a statute it administers." No. 00-11837 Pet. for Reh'g *En Banc* 12.

and interpretations of a statute where the statute is ambiguous with respect to the question at issue. The courts of appeals agree that a court should defer to an agency's clarifying interpretation of an ambiguous statute, even when it departs from the interpretation in prior court precedent, so long as the current administrative interpretation is reasonable.

Indeed, petitioners concede that there is agreement among the courts of appeals that a court may defer to an intervening agency interpretation of an ambiguous statute "where the prior [court of appeals] decision deferred, at *Chevron* step two, to an agency interpretation that has since been changed." Pet. 23; *see also id.* at 23-24 (citing cases); *C.E.K. Indus. Mech. Contractors, Inc. v. NLRB*, 921 F.2d 350, 357 (1st Cir. 1990); *Grocery Mfg. of Am. v. Gerace*, 755 F.2d 993, 1000-1001 (2d Cir.), *aff'd mem.*, 474 U.S. 801 (1985); *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. NLRB,* 843 F.2d 770, 779-780 (3d Cir. 1988); *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1123 n.8 (6th Cir. 1997); *NLRB v. Bufco Corp.*, 899 F.2d 608, 610-611 (7th Cir. 1990); *Norwest Corp. v. Commissioner*, 69 F.3d 1404, 1408-1409 (8th Cir. 1995); *National Org. of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs,* 260 F.3d 1365, 1374 & n.7 (Fed. Cir. 2001). Thus, the court of appeals properly deferred to the intervening agency interpretation in the instant cases.

This is not, as petitioners suggest (Pet. 27-29), judicial abdication to executive branch officials. Instead, the result flows directly from *Chevron.* As Justice Scalia noted in his dissent in *United States v. Mead Corp.*, 533 U.S. 218, 248 (2001), "[u]nder *Chevron* proper, when the agency's authoritative interpretation comes within the scope of that ambiguity – and the court therefore approves it – the agency will not be 'overruling' the court's decision when it later decides that a different interpretation (still within the scope of the ambiguity) is preferable." *See also* T. Merrill & K. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 916 (2001) ("At least if the issue is one as to which the statute admits of more than one meaning, then the agency

interpretation logically should take precedence over the judicial interpretation.").

C. The Question Whether Deference Is Owed HUD's 2001 Statement Of Policy Does Not Warrant Review

1. Petitioners appear at one point to raise an issue regarding the level of deference to which the portion of HUD's 2001 Statement of Policy that addresses Section 8(a) of RESPA is entitled. Pet. 16-18. Their own acknowledgment that the appropriate level of deference owed HUD's Statement of Policy should be identified necessarily means that the statute is ambiguous because otherwise the agency interpretation is owed no deference.

In any event, it is the text of the Question Presented, and not the discussion in the body of a petition, that determines the scope of the Question Presented. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 31 n.5 (1993). Although not a model of clarity, petitioners' Question Presented in these cases is limited to the purported "conflict with seven other circuits that have denied agencies the authority to use policy pronouncements to overrule circuit precedent," Pet. i, and does not present the question of what level of deference is due HUD's 2001 Statement of Policy. This becomes particularly clear when compared with the petitions for certiorari filed by plaintiffs (represented by some of the same counsel as the petitioners in these cases) in two earlier cases under Section 8(a) that expressly presented the question of what deference is owed HUD's Statement of Policy. *See* Pet. for Cert. i, *Glover v. Standard Fed. Bank*, 123 S. Ct. 344 (2002) (No. 01-1648) (Question 2); Pet. for Cert. i, *Schuetz v. Banc One Mortgage Corp.*, 123 S. Ct. 994 (2003) (No. 02-709).[10] As already noted, this Court has twice denied

[10] Indeed, arguments opposing deference would be contrary to the position of Richardson and the Hirschs below, where they urged the

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certiorari on that question. *See* page 13, *supra*. Nothing has changed since those petitions were denied that would warrant a different result in these cases.

2. In any event, petitioners' objections to the deference accorded HUD's 2001 Statement of Policy are unwarranted. As an authoritative interpretation by the agency charged by Congress with interpreting RESPA, HUD's interpretation of Section 8(a), itself ambiguous with respect to the question of yield spread premiums, was properly found by the court of appeals to be entitled to deference, Pet. App. 5a-9a, and that reasoning would support affirmance of the judgment by the Court.

Relying on language from *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), petitioners attempt to challenge that deference, first contending (Pet. 16-17) that deference is never permitted when questions of interpretation arise in a private right of action. *Adams Fruit* did not set forth such a rule, but held only that an agency interpretation could not compel a court to hold that a federal remedy was preempted by state law. *See Adams Fruit Co.*, 494 U.S. at 650. The Court emphasized that such a jurisdictional determination was the province of the courts. *See ibid.* Here, HUD's Statements of Policy did not seek to withdraw an individual's federal cause of action, but simply made clear the agency's view about how to determine in what circumstances a yield spread premium violates Sections 8(a) and 8(c). This is a situation in which the Court has consistently granted deference to an agency's reasonable interpretation of an ambiguous statutory provision, including when the issue arises in the context of a private suit. *See, e.g.*, *Chevron U.S.A. Inc. v. Echazabal*,

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court of appeals to give "considerable deference" to a letter from the General Counsel of HUD written to a member of Congress. No. 99-11554 C.A. Reply Br. 9 n.4 (quoting *Herman v. NationsBank*, 126 F.3d 1354, 1363 (11th Cir. 1997) (granting *Chevron* deference to agency's "official position" regarding the meaning of a statute embodied in a letter but not reflected in "formal regulations")).

536 U.S. 73, 84 (2002) (deferring to agency's regulation); *Smiley*, 517 U.S. at 741 (deferring to agency's litigation-inspired regulation); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567-568 (1980) (deferring to agency letters).

Under the HUD interpretation of RESPA adopted by the court of appeals, plaintiffs must demonstrate that the total compensation to the mortgage broker was unreasonable in light of the services performed. *See* App., *infra*, 6a. It remains the exclusive province of the courts to determine whether a plaintiff has proffered sufficient evidence to survive summary judgment or whether class certification under Federal Rule of Civil Procedure 23 is appropriate in a particular case.

Moreover, unlike the statute at issue in *Adams Fruit*, which delegated no relevant regulatory authority to the agency, RESPA expressly delegates to HUD, through its Secretary and other Senate-confirmed officials (such as the Assistant Secretaries who signed the Statements of Policy), the broad authority to issue regulations and interpretations of the relevant statutory provision. *See* 12 U.S.C. § 2617(a). Therefore, this Court's holding in *Adams Fruit* does not present any impediment to the court of appeals deferring to HUD's clarified test for liability under Sections 8(a) and 8(c).

3. Petitioners also claim (Pet. 17-18) that *Chevron* deference to HUD's 2001 Statement of Policy is not appropriate because it was not promulgated pursuant to notice-and-comment rulemaking. To support that claim, petitioners rely on language in *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). This Court rejected that understanding of *Christensen* in *Barnhart v. Walton*, 535 U.S. 212 (2002). "[T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due. If this Court's opinion in *Christensen* * * * suggested an absolute rule to the contrary, our later opinion in *United States v. Mead Corp.*, 533 U.S. 218 (2001), denied the suggestion." *Id.* at 221-222 (some citations omitted). This

is not to say that all agency policy statements are entitled to *Chevron* deference. *See, e.g., Clackamas Gastroenterology Assocs., P.C. v. Wells*, 123 S. Ct. 1673, 1680 n.9 (2003).[11] Under the standards articulated in *Mead* and *Barnhart*, whether an agency's interpretation of a statute, including in a statement of policy, is entitled to *Chevron* deference depends first on the statute being ambiguous with respect to the question at issue and, if ambiguous, on an array of factors, including the expertise of the agency, the care the agency has given the question, the consistency of its interpretation, and the method Congress intended the agency to use to express its interpretations. *See Barnhart*, 535 U.S. at 219-220, 222.

In the instant cases, the court of appeals properly relied upon several factors in determining that HUD's 2001 Statement of Policy warranted deference with respect to the determination of the validity of yield spread premiums under Section 8(a) of RESPA. The court found that the reasoning of the 2001 Statement of Policy regarding Section 8(a) reflects a careful consideration of an issue that is closely related to the expertise of the agency. Pet. App. 8a; *see also Schuetz*, 292 F.3d at 1014 ("HUD has not exceeded its area of expertise"); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 881 (7th Cir. 2002), *pet. for cert. filed*, No. 02-1430 (Mar. 26, 2003) (dictum) (in contrast to a portion of the 2001 Statement of Policy's cursory treatment of another

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[11] In *Clackamas*, the United States "acknowledged" that the agency manual at issue was not entitled to *Chevron* deference. *Ibid.* Contrary to petitioners' suggestion (Pet. 18), the United States has not indicated that HUD's Statements of Policy are not entitled to *Chevron* deference. In the case cited by petitioners (issued only a month after this Court issued its *Chevron* decision), the Sixth Circuit noted that the government had contended in a criminal prosecution under RESPA that "although not binding, the administrative interpretations [issued pursuant to Section 19(a) of RESPA] are entitled to deference and should be followed in the absence of compelling indications that the interpretations are wrong." *United States v. Graham Mortgage Corp.*, 740 F.2d 414, 421-422 (6th Cir. 1984).

issue under a different provision of RESPA, "both [the 1999] statement and a portion of the 2001-1 statement * * * that further addressed the issue of yield-spread premiums contain a full discussion of that issue"). Also, the portion of the 2001 Statement of Policy concerning Section 8(a) is consistent with earlier agency interpretations. Pet. App. 7a-8a; *see also Schuetz*, 292 F.3d at 1013-1014 (same). Moreover, both the 1999 and 2001 Statements of Policy regarding Section 8(a) were issued only after consultation with consumer and industry representatives. *See* 64 Fed. Reg. at 10,084 ("in developing this [1999] policy statement, HUD met with representatives of government agencies, as well as a broad range of consumer and industry groups"); *Martinez Moves to Protect Homebuyers; Calls for Simplified Process*, HUD News Release No. 01-105 (Oct. 15, 2001) (announcing that it "met with members of the mortgage industry and consumer advocates before deciding upon the [2001 Statement of Policy]"), *available at* www.hud.gov/news/release.cfm?content =pr01-105.cfm.[12]

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[12] Petitioners imply that HUD's 2001 Statement of Policy should not be entitled to deference because, they contend, HUD "subsequently admitted" that the Statement was "the result of a deal with the [mortgage] industry." Pet. 10, 19 n.15. Not surprisingly, the HUD document relied on for that proposition does not contain such an admission. The document states that "representatives of the mortgage industry urged HUD to issue a clarification of its 1999 Statement of Policy," and that they "assured the Department [in letters] that following a clarification by HUD, they also would support a HUD rule requiring improved fee disclosure." 67 Fed. Reg. 49,143 (2002). It does not say, as petitioners suggest, that this offer resulted in HUD issuing the Statement of Policy.

In addition, respondents do not accept the authenticity of the extra-record materials submitted by petitioners, nor their speculation as to the authorship of those extra-record materials. Pet. App. 112a-148a. In any event, a comparison between petitioners' extra-record materials and the 2001 Statement of Policy actually issued by HUD demonstrates that those materials apparently did not control either the specific language or the format of the agency's interpretation. *Compare id.* at 116a, 135a, 136a (recommending that HUD remove language "for the

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Finally, Congress specifically prohibited imposing liability under RESPA on persons who act "in good faith in conformity with any rule, regulation, *or interpretation* thereof by the Secretary [of HUD] or the Attorney General." 12 U.S.C. § 2617(b) (emphasis added). Congress thus envisioned that HUD interpretations, whether or not issued through notice-and-comment rulemaking, could change the legal rights of the public. As this Court explained with regard to a virtually identical provision in the Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*, "[t]hat statutory provision signals an unmistakable congressional decision to treat administrative rulemaking *and interpretation* under TILA as authoritative" when a court is faced with "an apparent lacuna in the express prescriptions of TILA." *Milhollin,* 444 U.S. at 567-568, 570 (emphasis added). Indeed, it was Congress that spurred HUD to issue a Statement of Policy on the interpretation of Sections 8(a) and 8(c) at issue in these cases. *See* H.R. Conf. Rep. No. 769, 105th Cong., 2d Sess. 260 (1998) (instructing HUD to issue a "policy statement * * * clarify[ing] its position on lender payments to mortgage brokers within 90 days"). By explicitly directing an agency to provide guidance on the precise question and in a particular format, Congress indicated that it expected HUD's Statement of Policy concerning yield spread premiums and Section 8(a) to carry weight. *Cf. Rostker v. Goldberg*, 453 U.S. 57, 74 (1981) (a conference report adopted by both Houses "is considerably more significant than a typical report of a single House, and its findings are in effect findings of the entire Congress").[13]

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compensation paid" and "for the total compensation paid" from the Statement of Policy), *with* 66 Fed. Reg. at 53,053, 53,054, 53,056 (retaining the language that had been recommended for deletion).

[13] These factors would also support deference under the alternative argument pressed below (but not reached by the court of appeals, *see* Pet. App. 9a n.7), that HUD's 2001 Statement of Policy regarding yield spread premiums would be entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Even if HUD's 2001 Statement of Policy regarding Sections 8(a) and 8(c) is not entitled to deference under *Chevron*, petitioners do not address the alternative ground for upholding the court of appeals' decision, pressed below (although not reached by that court, *see* Pet. App. 9a n.7) and adopted by the Eighth Circuit in *Glover*, that the Statement of Policy regarding yield spread premiums would be entitled to deference as a reasonable construction of HUD's own ambiguous regulations implementing those provisions. Since *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), this Court has consistently held that an agency interpretation of its own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Accord Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993) (collecting cases). The agency's interpretation of its own regulation need not be executed in any particular manner to be entitled to deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deferring to agency's construction of regulations expressed in *amicus* brief). Indeed, the Eighth Circuit has concluded that HUD's 2001 Statement of Policy regarding yield spread premiums was "controlling authority" because it reasonably interpreted HUD's own regulations. *See Glover*, 283 F.3d at 962; *cf. Krzalic*, 314 F.3d at 882 (Easterbrook, J., concurring) (dictum) (noting independent basis of *Glover*'s deference).

4. Petitioners seek (Pet. 25-26) to manufacture a split regarding deference to HUD's interpretation of Sections 8(a) and 8(c) in the 2001 Statement of Policy by mischaracterizing the decision of the Seventh Circuit in *Krzalic*, 314 F.3d 875. *Krzalic* declined to defer to the portion of HUD's 2001 Statement that sought to interpret a different provision of RESPA – Section 8(b), which prohibits giving or accepting "any portion, split, or percentage of any charge." 12 U.S.C. § 2607(b). The Seventh Circuit reached that conclusion because it found that the text of Section 8(b) was unambiguous with respect to the issue before it – whether Section 8(b) requires an actual split or apportioning of fees in order to show a violation –

and could not be read to prohibit conduct where the fee was not split with a third party, as urged by HUD in the 2001 Statement of Policy. 314 F.3d at 879. Because the Seventh Circuit found that the "statutory provision is clear on its face" with respect to the fee split requirement, *ibid.*, that portion of the 2001 Statement of Policy could not satisfy the precondition for deference articulated in *Chevron*, and the *Krzalic* court thus correctly declined to accord it deference. *See also id.* at 881 (finding no "play in the statutory joints").[14] That conclusion is in accord with other circuits that have addressed the meaning of Section 8(b) and found it to be unambiguous. *See Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 267 (4th Cir. 2002) (refusing to defer to portion of HUD's 2001 Statement of Policy because Section 8(b) unambiguous); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 838-839 (8th Cir. 2003) (same).

By contrast, as set forth above, the courts of appeals are in agreement that Sections 8(a) and 8(c) of RESPA, 12 U.S.C. § 2607(a) & (c), which are at issue in the instant cases, are ambiguous with respect to the question at issue here. Petitioners argue that the contrast between *Krzalic* and the cases below "could not be starker." Pet. 26. But in each case the courts of appeals employed similar analyses and correctly reached different results because one provision was determined to be unambiguous, but the other ambiguous.

Review by this Court of these questions, which have generated no division in the results reached by the various courts of appeals, is not warranted.

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[14] The extended discussion in *Krzalic* about the level of deference to which the 2001 Statement of Policy would be entitled was *dictum*, as the concurrence noted. *See* 314 F.3d at 883 (Easterbrook, J., concurring) (clear statutory text makes majority's discussion of *Chevron* "by the by").

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 27, 2003

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11837

D.C. Docket No. 98-01032 CV-0DE-1

PAMELA C. HIRSCH, individually, and on behalf of all others similarly situated, DAVID L. HIRSCH,

Plaintiffs-Appellants,

versus

BANKAMERICA CORPORATION, a Delaware corporation, BANK OF AMERICA FSB, INC., a Hawaii corporation, BANKAMERICA MORTGAGE, a division of BankAmerica FSB, a Hawaii corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(April 23, 2003)

Before EDMONDSON, Chief Judge, COX and GIBSON*, Circuit Judges.

PER CURIAM:

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* Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

In this RESPA case, Plaintiffs Pamela and David Hirsch appeal the district court's grant of summary judgment to defendants BankAmerica Corp. and Bank of America FSB (collectively "Bank of America"). We affirm.

This case is one of several dealing with the legality of the payment of Yield Spread Premiums (YSPs) by mortgage lenders to mortgage brokers. In *Heimmermann v. First Union Mort. Corp.*, 305 F.3d 1257 (11th Cir. 2002), we said that the Department of Housing and Urban Development's (HUD's) 2001 Statement of Policy (2001 SOP)[1] applies retroactively and governs the disposition of these cases.

BACKGROUND

Pamela and David Hirsch sought a mortgage loan to purchase a new home. They hired Rodgers Mortgage Company (Rodgers) to act as their mortgage broker. The Hirsches told Rodgers that they wanted a low interest rate and the lowest possible closing costs. Rodgers performed all the services necessary to allow the Hirsches to obtain a $150,000.00 home loan; and Rodgers selected Bank of America as the mortgage lender.[2]

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[1] Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53,052 (Oct. 18, 2001).

[2] It is undisputed that Rodgers provided a variety of services including these services:

(a) visiting the Hirsches on several occasions to obtain information;

(b) completing the loan application;

(Continued on following page)

Rodgers received a total of $2,125.00 for their services. The Hirsches paid Rodgers a $1,000.00 loan origination fee[3] and a $750.00 loan discount fee. In addition, Bank of America paid Rodgers a $375.00 YSP.[4] Rodgers' total compensation was approximately 1.4% of the $150,000.00 loan. Rodgers typically received compensation ranging from 1.5% to 2% of mortgage loans. The total compensation was in the lower range of what other mortgage brokers in that market charged for similar transactions.

The Hirsches' loan closed on 20 June 1996. Later, they filed this case – initially as a class action – claiming the payment of the YSP violated section 8 of the Real Estate Settlement Procedures Act (RESPA).[5] The district court

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(c) preparing various required disclosure documents;

(d) obtaining and verifying the Hirsches' financial records;

(e) obtaining a credit report;

(f) arranging an inspection of the property;

(g) arranging for the appraisal of the property;

(h) re-scheduling the closing to accommodate the Hirsches; and

(i) attending the closing of the loan.

[3] The Hirsches believed the $1000.00 covered all of Rodgers' services. The Hirsches claim they are unaware of services that Rodgers specifically performed to earn the YSP.

[4] The YSP was derived from published rate sheets which tied the amount of the YSP to the amount and the interest rate of the loan.

[5] Section 8 of RESPA prohibits the payment of referral fees, it provides in pertinent part:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607.

(Continued on following page)

denied class certification on 20 April 1999. In *Richardson v. BankAmerica Corp.*, No. 99-11554, slip op. (11th Cir. Jan. 24, 2003), we affirmed the district court's denial of class certification. While the class certification appeal was pending, Bank of America moved for summary judgment. The district court granted Bank of America's motion because the Hirsches "failed to demonstrate a genuine issue of fact as to Rodgers' actual provision of valuable goods and services or the reasonableness of their compensation for those services."[6]

DISCUSSION

In its 2001 SOP, HUD emphasized that a YSP – calculated based on the difference between the interest rate of the loan and the market rate – can be "a useful means to pay some or all of a borrower's settlement costs" as well as "a legitimate tool to assist the borrower." 2001 SOP, 66 Fed. Reg. 53052, 53054 (Oct. 18, 2001). HUD stressed that "neither Section 8(a) of RESPA nor the 1999 [SOP] supports the conclusion that a yield spread premium can be presumed to be a referral fee based solely upon the fact that the lender pays the broker a yield spread premium that is based upon a rate sheet. . . . " *Id.* at 53055. HUD cautioned that YSPs must be evaluated on

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This case was filed in the Middle District of Georgia. Pursuant to a consent order, the case was transferred to the Northern District of Georgia and consolidated with *Richardson v. BankAmerica Corp.*, Civil Action No. 1:98-CV-1031-ODE.

[6] Bank of America also moved for summary judgment on the Richardson's claims. Finding material facts at issue, the district court denied summary judgment on those claims. This portion of the district court's order is not before us, and we say nothing about it.

a case by case basis in the context of "the specific factual circumstances applicable to each transaction." *Id.* at 53054.

After stating YSPs were not per se legal or illegal, HUD clarified a two part test – which we adopted in *Heimmermann* – to determine the legality of a payment from a mortgage lender to a mortgage broker. *Id.* at 53055; *see also Heimmermann,* 305 F.3d at 1263-64. The test is satisfied here.

Under HUD's test, we first must "determine whether the broker has provided goods or services of the kind typically associated with a mortgage transaction." *Heimmermann,* 305 F.3d at 1263. HUD, in its 1999 Statement of Policy (1999 SOP)[7], listed some services that satisfy this factor. *See* 1999 SOP, 64 Fed. Reg. 10080, 10085 (Mar. 1, 1999). Rodgers provided many of these services: taking information from the borrower; filling out the application; analyzing the prospective borrower's income and debt; collecting financial information; initiating/ordering appraisals and inspections; providing disclosures; maintaining regular contact with the borrower; and attending the closing.[8]

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[7] Real Estate Settlement Procedures Act Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10,080 (March 1, 1999).

[8] The Hirsches argue Bank of America failed to identify services performed by Rodgers to earn the YSP in particular. But HUD instructs us to look at all the services performed and to evaluate them in the light of all the compensation (not the YSP in isolation) the mortgage broker received from any source.

(Continued on following page)

Because Rodgers did provide actual services, we proceed to the second step of HUD's test, "determining whether the total compensation paid to the broker is reasonably related to the total value of the goods or services actually provided." *Heimmermann,* 305 F.3d at 1264. "Total compensation includes fees paid by a borrower and any yield spread premium paid by a lender, not simply the yield spread premium alone." 2001 SOP, 66 Fed. Reg. at 53055. The Hirsches have never argued that Rodgers's total compensation was unreasonable in the light of the services Rodgers performed. Their argument, in a nutshell, was that the YSP, in particular, was not actually paid for – or tied to – specific services; so, they say the YSP was improper. This legal position was rejected by HUD's 2001 SOP which we adopted in *Heimmermann.*

> HUD does not believe that it is necessary or even feasible to identify or allocate which facilities, goods or services are performed or provided for the lender, for the consumer, or as a function of State or Federal law. All services, goods and facilities inure to the benefit of both the borrower and the lender in the sense that they make the loan transaction possible. . . .

1999 SOP, 64 Fed. Reg. at 10086. The Hirsches' subjective belief that the $1000 origination fee was supposed to cover these services does not automatically transform the YSP into a referral fee. Rodgers possibly should have done a better job of explaining its compensation to the Hirsches, but this fact does not make the YSP illegal. A YSP will fail the first element of HUD's test if it is "a payment to a broker who provides 'no, nominal, or duplicative work'. . . . " *Heimmermann,* 305 F.3d at 1263 n.8.

The Hirsches argument that the YSP was not itemized as a credit to the borrower in the 200 series of the HUD-1 form and therefore did not offset their costs is also unpersuasive. HUD recommends – but does not require – listing YSPs in the 200 series. 66 Fed. Reg. at 53056. The YSP was disclosed on the HUD-1 form exactly as HUD requires.

We accept the district court's unchallenged determination of reasonableness. Because both elements of HUD's test were met, we AFFIRM the district court's grant of summary judgment.[9]

AFFIRMED.

[9] The district court also granted summary judgment because of RESPA's one-year statute of limitations. Because we affirm the grant of summary judgment on this ground, we do not decide whether the claim was timely.

(3)

Supreme Court, U.S.
FILED
MAY 27 '03
OFFICE OF THE CLERK

No. 02-1432

IN THE
Supreme Court of the United States

DANIEL HEIMMERMANN AND EMILY HEIMMERMANN, BOTH INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,
v.
FIRST UNION MORTGAGE CORPORATION,
Respondent.

BETH A. RICHARDSON AND PAMELA C. HIRSCH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, DAVID L. HIRSCH,
Petitioners,
v.
BANKAMERICA CORPORATION, A DELAWARE CORPORATION, BANK OF AMERICA FSB, INC., A HAWAII CORPORATION, BANKAMERICA MORTGAGE, A DIVISION OF BANKAMERICA FSB, A HAWAII CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND PUBLIC CITIZEN AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

Whether the Eleventh Circuit erred in according *Chevron* deference to an informal Department of Housing and Urban Development ("HUD") policy statement, the explicit purpose of which was to overrule the Eleventh Circuit's own precedent in this case, given that: (i) The Eleventh Circuit had previously held the same legal interpretation as later espoused by the policy statement to be contrary to the clear language and an unreasonable interpretation of the statute; and (ii) the deference accorded by the Eleventh Circuit to HUD's informal agency policy statement conflicts with seven other circuits that have denied agencies the authority to use policy pronouncements to overrule circuit precedent.

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Consumer Advocates ("NACA") is a membership organization consisting of private and public sector attorneys, legal services attorneys, law professors, and students whose primary practices and areas of specialty involve consumer protection issues. NACA was a member of the Negotiated Rulemaking Advisory Committee on Mortgage Compensation and Disclosure of the Department of Housing and Urban Development ("HUD").

Public Citizen is a national consumer organization with approximately 125,000 members. This organization has a long-standing interest in preventing large institutions (including the Federal Government) from compelling consumers and workers to forgo remedies. It believes the Court should grant review because the rights that Congress sought to protect under the Real Estate Settlement Procedures Act of 1974 will be undermined if the Eleventh Circuit's decision stands.

Amici further believe that the approach taken by the Eleventh Circuit, to afford *Chevron* deference to an informal agency policy statement and thereby require the overruling of circuit precedent, accords far too much power to administrative agencies selectively to adhere to decisions by courts of appeals. Under the Eleventh Circuit's approach, an agency can simply reverse a court of appeals decision through an agency statement that has no input from the public, no formal notice and comment opportunity, and none of the other indicia of law.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this *amicus* brief and that no entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amici* represents that counsel for all parties have consented to the filing of this *amicus* brief. Letters reflecting their consent have been filed with the Clerk.

STATEMENT

Buying and financing a home is a typical consumer's largest and most complex financial transaction.[2] The complexity of the transaction and the infrequency of the average homeowner's experience with mortgage transactions make consumers especially vulnerable to being overcharged for loan origination services.[3] The broad array of loan products now available to consumers has rendered the home purchase and mortgage process significantly more complicated and confusing.[4] As a result, the average residential borrower must rely on the mortgage broker or a loan officer when choosing mortgage products. Yet the industry promotes a secret incentive system designed to encourage brokers to recommend higher interest rate loans that will result in fees to brokers that are wholly unrelated to whether anything is owed to the broker for its services.

Kickbacks and referral fees are a commonplace, long-standing practice in the residential mortgage industry. *See* Paul Barron, *Federal Regulation of Real Estate and Mortgage Lending* ¶ 2.04, at 2-25 n.1 (3d ed. 1992). Congress attempted to end those practices in 1974 when it enacted the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601 *et seq.*, which contains a prohibition against the giving or receiving of "any fee, kickback, or thing of value pursuant to any agreement or

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[2] *See* Testimony of Gail Laster, General Counsel, U.S. Department of Housing and Urban Development, Before the Subcomms. on Financial Institutions and Consumer Credit and on Housing and Community Opportunity of the House Comm. on Banking and Financial Services, 105th Cong. (July 22, 1998).

[3] *See, e.g.*, S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6547 (consumers' lack of understanding about the settlement process and its costs makes it difficult in a free market for settlement services to function at maximum efficiency).

[4] *See* Testimony of James McCabe on behalf of the Mortgage Bankers Association of America Before the Subcomm. on Housing and Community Opportunity of the House Comm. on Banking and Financial Services, 105th Cong. (Mar. 27, 1998).

understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a).

In 1992, after the emergence of the mortgage brokerage industry, Congress amended RESPA to make it expressly applicable to mortgage originations. At that time, HUD did not take a position on the legality of yield spread premiums. *See Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers*, 64 Fed. Reg. 10080, 10082 (1999) ("1999 Policy Statement") (Pet. App. 137a). HUD did, however, issue rules requiring that all payments to brokers be disclosed, including yield spread premiums. *See* 12 U.S.C. § 2603(a); 24 C.F.R. Pt. 3500, App. A. This requirement caused an uproar in the mortgage industry, which claimed that consumers "did not benefit from the disclosure [of yield spread premiums]" because disclosure of such "indirect" fees would "confuse" and "mislead" borrowers. *See* 1999 Policy Statement, 64 Fed. Reg. at 10083 (Pet. App. 139a).[5]

A substantial number of borrowers obtain home mortgage financing by securing the services of a mortgage broker. *See id.* at 10080. These brokers provide some services to borrowers, such as completing standard loan applications, helping obtain appraisals, getting credit reports, and providing all origination services necessary to present a fundable loan. Importantly, mortgage brokers do not fund the mortgage loans that form the basis of this litigation and, therefore, do not own the loans at the time of closing. Loans originated by mortgage brokers, but funded by mortgage lenders, such as Respondents First Union and BankAmerica, are known as "table-funded" transactions.

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[5] A former HUD employee has described his experience of receiving more than 2,000 letters from mortgage brokers protesting HUD's suggestion that brokers should mention yield spread premiums on the federally mandated HUD-1 disclosure form. Grant E. Mitchell, *RESPA the Inside Story*, 60 Mortgage Banking 26, 1999 WL 12029502 (Nov. 1, 1999).

24 C.F.R. § 3500.2. In table-funded transactions, brokers steer borrowers to one of the many lending institutions with which the broker has a standard contractual relationship.

Each day lenders will send their brokers a "rate sheet" showing the interest rates at which the lenders are willing to loan money. The rate sheet constitutes the lender's agreement to pay a specified fee in exchange for the broker's referral of an inflated interest rate, or above-par, loan.[6] The more an interest rate exceeds the par rate on a particular loan, the greater the amount of the yield spread premium paid to the broker. In this manner, lenders reward brokers for sending them business where the borrower has been assessed an above-market interest rate. The mortgage broker decides the terms of the transaction from among the options offered on the rate sheet. This includes determining what the interest rate will be on that particular transaction by reference to the rate sheets. The borrower is prohibited by the lender from seeing these rate sheets and cannot therefore learn of the availability of better interest rates or the costs of accepting a higher interest rate.

Mortgage brokers are paid for their services in a variety of ways. They usually charge a "loan origination fee" to compensate them for their work in helping to arrange the loan. They also charge specific fees for certain services such as document preparation fees, processing fees, and application fees. These fees are usually paid directly by the borrower at closing.

Brokers also commonly receive indirect compensation from the lenders with whom they have referral agreements. These payments are referred to variously as "yield spread premiums," "service release premiums," or "back funded payments." 1999 Policy Statement, 64 Fed. Reg. at 10081.

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[6] A "par loan" is a loan that a lender will fund at 100 cents on the dollar, as shown on the rate sheet. An "above-par loan" is one that is placed at an interest rate higher than "par" and for which the lender is willing to pay more than 100 cents on the dollar.

These fees are based upon the interest rate that the broker locks in for the lender.

SUMMARY OF ARGUMENT

Petitioners collectively seek redress for a violation of RESPA. By denying their right to proceed as a class, the Eleventh Circuit has made it impossible, as a practical matter, for a court to determine whether the practices of mortgage lenders such as Respondents violate RESPA. Borrowers and their counsel have little incentive to pursue claims that range from $500 to $2,500, particularly in light of the heavy discovery burden required by the "reasonableness" liability test adopted by the Eleventh Circuit.

Section 8 of RESPA contains a broad, straightforward prohibition against kickbacks and referral fees. Petitioners contend that Respondents' practice of paying yield spread premiums to mortgage brokers violates this prohibition. This question is appropriate for determination on a classwide basis because the practices of Respondents are uniform as applied to all putative class members.

The sole basis for the Eleventh Circuit's decertification order was its deference to HUD's 2001 "Clarification" of its Policy Statement. *See* 1999 Policy Statement, 64 Fed. Reg. 10080 (1999); *Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)*, 66 Fed. Reg. 53052 (2001) ("2001 Policy Statement"). This 2001 Policy Statement states that, in determining whether there has been a violation of RESPA's prohibition against referral fees, each transaction must be looked at individually to determine whether the amount of the yield spread premium is "reasonable" considering the total compensation paid to the broker. HUD's rationale in its 2001 Policy Statement seeks to prohibit courts from employing the just and efficient class action mechanism to resolve hundreds of thousands of identical consumer claims

arising from the same course of corporate conduct and arising under the same federal statute.

In ruling as it did, the Eleventh Circuit has given HUD's 2001 Policy Statement the force of law. However, this policy statement did not result from any formal rulemaking process, such as a notice and comment procedure, that would have allowed *amici* and others to be heard. In fact, HUD's 2001 Policy Statement, on which the court below based its ruling, was the result of pressure from the industry to respond to and attempt to reverse the effect of the Eleventh Circuit's earlier *Culpepper III* decision, which properly interpreted RESPA's statutory language. *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324 (11th Cir. 2001), *cert. denied*, 534 U.S. 1118 (2002).

HUD, in its 2001 Policy Statement, has effectively conferred upon itself the very rate-setting authority that Congress specifically considered, and rejected, in enacting RESPA, by requiring an inquiry into the reasonableness of a broker's total compensation as a prerequisite to determining whether a yield spread premium violates RESPA § 8(a). Indeed, the Fourth Circuit has recently rejected HUD's attempt, through the same 2001 Policy Statement at issue here, to transform RESPA § 8(b) into a rate-setting statute. *See Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261 (4th Cir. 2002). And the Seventh Circuit has, in direct conflict with the decision below, rejected the notion of giving *Chevron* deference to HUD's 2001 Policy Statement. *See Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002).

HUD's 2001 Policy Statement is itself based on the false assumption that borrowers "choose" to pay yield spread premiums in order to finance the payment of settlement costs and fees instead of paying them directly. The mortgage broker industry has consistently and vigorously resisted any meaningful disclosure to borrowers about the existence or effect of yield spread premiums. Yield spread premiums are classic kickback payments for referrals

exchanged between lenders, such as Respondents, and their network of brokers. The borrowers are not participants in or cognizant of these kickback arrangements. Instead, as Congress recognized, borrowers such as the Heimmermanns, Hirsches, and Richardson are the victims of this practice and suffer the resulting increased home loan costs.

ARGUMENT

I. YIELD SPREAD PREMIUMS ARE DESIGNED TO ENCOURAGE BUSINESS REFERRALS, NOT TO FINANCE CLOSING COSTS

A. Yield Spread Premiums Are Marketed And Designed To Promote Business Referrals

The mortgage industry's own representatives admit that yield spread premiums are a "method of enticing mortgage brokers to refer loans to lenders." Robert A. Cook, *Yield Spread Premiums Come Under Attack*, 48 Consumer Fin. L.Q. Rep. 94 (1994). Similarly, counsel for the National Home Equity Mortgage Association ("NHEMA") explains on NHEMA's website that the "uncertainty" surrounding the legality of yield spread premiums hurts lenders that refuse to pay yield spread premiums because they "lose market share." *See* Joe Lefkoff, *HUD Continued Inaction Contributes to the Chaos Associated with RESPA* (1997), *at* www.nhema.org/hudrespa.htm. Payment for referring a borrower to settlement service providers, such as lenders, is precisely what RESPA prohibits. It would be difficult to imagine a practice that is more questionable under the law and that affects more consumers than the subject yield spread premium practice.[7]

The mortgage industry's own lawyers warned long ago that the practice of paying yield spread premiums was dubious at best. More than six years ago, one industry lawyer warned:

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[7] Given the volume of mortgage business done by BankAmerica and First Union, it would not be surprising if hundreds of thousands of consumers are adversely affected by their practices.

> Some lenders pay an "overage" to a broker or dealer for "up-selling the rate." This refers to additional payments by an equity lender to a broker for a loan that has a higher-than-expected rate of interest. The extra payment from the equity lender is intended to compensate the broker for bringing to the lender such an attractive, high rate loan. *If a RESPA Sec. 8 violation is asserted, it is debatable whether an equity lender can defend payment of the extra overage money as payment of a thing of value for services rendered.*

Leonard A. Bernstein, *RESPA Invades Home Equity, Home Improvement and Mobile Home Financing*, 48 Consumer Fin. L.Q. Rep. 194, 197 (1994) (emphasis added).

Another industry attorney issued even stronger warnings to the lending and brokerage industry that the practice of paying yield spread premiums in table-funded loans violates RESPA's anti-kickback provisions:

> It is my opinion that three compensation practices — back end points, yield spread differentials and service release fees — are prohibited and illegal. . . . Yield differentials in which pay is based upon the difference between the rate obtained by the broker and the rate at which the lender would otherwise be willing to make the loan can be even more "explosive." . . . [T]he only bona fide way to base compensation on yield differentials, which are sometimes known as overages, is if the deal is clearly a secondary market transaction. If, on the other hand, the lender is table funding the loan, he is violating RESPA Sec. 8 anti-kickback provisions.

HEL Lenders May Be Sued On Broker Referrals, National Mortgage News at 111 (Apr. 3, 1995); *see also* Joe Lefkoff, *Traditional Broker Compensation Under RESPA: Is it Legal?*, Equity Magazine at 18 (Dec. 1994) ("While a yield spread is permitted and justifiable in a secondary market transaction, it is a prohibited fee for referral in the table funded or broker referral situation. The payment, while

measured by the yield spread, is for the referral."). Since the inception of this practice, the use of yield spread premiums has been acknowledged as highly suspect by industry and consumer representatives. The availability of a class action thus provides an opportunity to resolve efficiently the legality of the type of yield spread payments made by Respondents and other lenders.

B. Respondents Misrepresent Consumer Choice In Today's Marketplace

The simple duplicity of Respondents' contention that consumers "choose" to pay yield spread premiums in exchange for lower up-front payments is obvious from the fact that the mortgage industry continues to hide yield spread premiums from borrowers. Yield spread premiums are often "disclosed" on the HUD-1 Settlement Statement with designations such as "$2,000 yield spread premium to Broker POC."[8] Richardson's HUD-1 makes reference to a "Premium Pricing to POC (600.00) from B of A to AMM [Atlanta American Mortgage]." Pet. App. 91a (line 811). As HUD has recognized, these cryptic "disclosures" mean nothing to the average borrower. *See* 1999 Policy Statement, 64 Fed. Reg. at 10087. They certainly are not consistent with Respondents' claim that yield spread premiums are presented to borrowers as a financing option.

II. THERE IS NO SUCH THING AS A "REASONABLE" REFERRAL FEE UNDER RESPA

Nothing in the text or legislative history of RESPA supports Respondents' position that a lender's payment of a referral fee is not a referral agreement made illegal under RESPA § 8(a) so long as the broker performs some specified work for the borrower and the total compensation that the broker receives is "reasonable." The words "total compensation" and "reasonable" are not even in § 8(a) or (c)

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[8] Translation: The lender has made a payment outside closing ("POC") of $2,000 to the broker and that payment was calculated by the yield spread premium.

of RESPA. Such an analysis simply stands RESPA's prohibition against kickbacks and referral fees on its head. The statute prohibits *all* kickbacks and referral fees — no matter how great or small their cost and no matter how great or small the broker's "total compensation." Nothing in the plain text of § 8(a) or (c) supports a reading that a referral fee becomes legal simply because it is part of an overall fee paid to a broker that is "reasonable."

Moreover, the legislative history of RESPA demonstrates clearly that Congress sought to outlaw certain practices and refused to empower HUD to police the reasonableness of settlement fees. In 1970, Congress adopted § 701 of the Emergency Home Finance Act, which charged HUD and the Veterans Administration with the task of prescribing standards governing the amount of closing costs on FHA-insured and VA-guaranteed loans. S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6558. A joint HUD/VA study was completed in 1972, which documented an elaborate system of referral fees, kickbacks, rebates, commissions and the like as an inducement to those firms and individuals who direct payment of business and urged Congress to take immediate action to prevent such kickbacks by establishing maximum allowable settlement charges on FHA-VA transactions in specific housing market areas. *Mortgage Settlement Costs: Report of the Department of Housing and Urban Development and Veterans Administration* 3 (Mar. 1972) (Comm. Print of the Senate Comm. on Banking, Housing and Urban Affairs, 93d Cong., 2d Sess.).

Congress considered two bills aimed at addressing the problems identified in the HUD/VA Report, which differed with respect to the authority of HUD and the VA to regulate charges for settlement services. One bill regulated closing costs directly by placing a ceiling on the charges that could be imposed in a real estate closing of any federally related home loan, while the second bill regulated the underlying business relationships and procedures of which the costs were a function. In enacting RESPA,

Congress chose the second approach. *See Real Estate Settlement Costs: Hearings on H.R. 9989 Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 93d Cong. 49 (1973) (testimony of Rep. Stephens) (explaining that the provisions in the proposed legislation pertaining to the reasonableness of settlement fees were eliminated).

The legislative history demonstrates that Congress did not intend for the legality of payments such as a yield spread premium to be dependent on the reasonableness of a broker's total compensation. The test Congress enacted in RESPA was whether the broker performed legitimate services in connection with each payment received, hence the fee "for" service language in § 8(c) and the fee for referral language, *i.e.*, "pursuant to," of § 8(a). Any other interpretation would fly in the face of Congress's clear intent to outlaw kickbacks and referral fees. Although Congress clearly rejected rate-setting measures, HUD has now tried to provide for rate setting through its "reasonable" overall payment analysis. Moreover, HUD is attempting to implement rate setting through an informal policy statement regarding an earlier informal policy statement, neither of which had the benefit of notice-and-comment rulemaking. Instead, HUD's 2001 Policy Statement was developed behind closed doors and without the required opportunity for the public to be heard.

The Fourth Circuit has rejected a similar attempt by HUD, in the same 2001 Policy Statement at issue here, to impose a reasonableness test on RESPA § 8(b). *See Boulware*, 291 F.3d 261. That court found that "RESPA was meant to address certain practices, not enact broad price controls." *Id.* at 268. Under HUD's interpretation, however, a single service provider would be liable for violating RESPA § 8(b) only "when it charges a fee that exceeds the 'reasonable' value of goods, facilities, or services provided" — an inquiry that necessarily requires a determination of the appropriate maximum rate for those services. *Id.* at 267 (internal quotation marks omitted).

III. CLASS ACTIONS ARE BOTH APPROPRIATE AND NECESSARY TO REMEDY AND DETER VIOLATIONS OF RESPA

Without the enforcement mechanism of class action lawsuits, RESPA § 8(a) would become entirely ineffective. Criminal prosecutions for violations of § 8(a) are non-existent. Individual suits cannot effectively eliminate unlawful referral payments. Borrowers are not likely to find counsel willing to pursue litigation over a claim with an average value of less than $2,500.[9] Class actions are essential, therefore, to the effective enforcement of RESPA. Without this method of private enforcement, unlawful charges will continue with the result that the ability of many Americans to own their own home will be impaired.

Class actions serve an important function in our judicial system and can be a major force for economic justice. *See Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375 (1997). They often provide the only effective means for challenging wrongful business conduct, stopping that conduct, and obtaining recovery of damages caused to the individual consumers in the class. Frequently, many consumers are harmed by the same wrongful, standard corporate practice.

Here, Respondents' questioned conduct affects hundreds or even thousands of borrowers. A handful, or even a hundred filed individual suits, could not deter Respondents from their current lucrative practice of paying for referrals and driving up the costs of home ownership. A class action

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[9] It would be naive to think that RESPA's provision for attorney's fees would be sufficient to sustain consumers' rights. RESPA provides only that a "court *may* award to the prevailing party . . . costs . . . [and] *reasonable* attorneys' fees," 12 U.S.C. § 2607(d)(5) (emphasis added), which is far from the guarantee of recovery of an attorney's actual costs that would be needed to take on the considerable task of seeking remedies under RESPA with so small an amount at stake in any individual claim. Indeed, despite the prevalence of yield spread premiums in the mortgage industry, there have been few, if any, individual RESPA cases filed throughout the country.

is also the only means of efficiently redressing so many small claims. Hundreds of thousands of claims can be finally resolved in one action, one series of depositions and motions, and one trial. Individual actions are usually impracticable because the individual recovery would be insufficient to justify the expense of bringing a separate lawsuit.

Without class actions, businesses would be able to profit from their misconduct and retain their ill-gotten gains. *Id.* at 377. Class actions by consumers aggregate their power, enable them to take on economically powerful institutions, and make wrongful conduct less profitable. *Id.* The class action device is an extremely important vehicle for protecting consumers and holding corporate interests responsible for the harm that they do. *Id.* It also provides the only realistic mechanism by which injured persons can obtain injunctive relief to prohibit further illegal practices that would harm others.

As this Court recognized in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980), without the prospect that individuals can reduce their costs of litigation and their attorneys' fees by allocating them among all class members who benefit from any recovery, unlawful yield spread premiums are unlikely to be challenged. The time and expense necessary to undertake such an action far exceed the value of any potential individual recovery even if the amounts are trebled. For that reason, homeowners who are charged unlawful yield spread premiums are unlikely to obtain legal redress at an acceptable cost unless they can proceed on behalf of a class of those similarly situated. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'") (citation omitted).

This very concern was repeatedly expressed during congressional hearings on RESPA with regard to the lack of

power that an unsophisticated homeowner holds against the mortgage industry:

> The individual, untutored, inept, fragmented homeowner does not have the leverage that the savings and loan institutions, the banks, the other institutions that are lenders, have in dealing with the real estate establishment to get these settlement costs decreased, to get the premium for title insurance decreased, to do away with kickbacks, to do away with all of these other matters that add to higher settlement costs.

Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings on H.R. 13337 Before the Subcomm. on Housing of the House Comm. on Banking and Currency, 92d Cong. 576 (1972) (testimony of Earl A. Snyder, University of Maryland).

Moreover, a recent Urban Institute Study financed by HUD reveals that minorities are most harmed by the leverage that lenders and brokers possess.[10] This study found that "[t]here is no question that minorities are less likely than whites to obtain a mortgage financing and that, if successful, they receive less generous loan amounts and terms." HUD News Release, No. 99-191, *New Reports Document Discrimination Against Minorities by Mortgage Lending Institutions* at 1 (Sept. 15, 1999). The Urban Institute Study also found that African-Americans and Hispanics tend to pay higher yield spread premiums than whites and that women pay more than men. *See* Urban Institute Study at 95 n.11. This study confirms Professor Howell Jackson's finding that African-Americans and Hispanics who obtained loans paid substantially more in closing fees and costs than other borrowers.[11]

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[10] *See Mortgage Lending Discrimination: A Review of Existing Evidence* (Turner & Skidmore eds., 1999) ("Urban Institute Study").

[11] "For African Americans, the average additional charge was $474 per loan, and for Hispanics, the average additional charge was $580 per

The minute power and resources of borrowers compared to lenders makes the use of the class action mechanism particularly appropriate.

IV. HUD'S 2001 POLICY STATEMENT DEPRIVES CONSUMERS OF ANY INPUT INTO THE RULE-MAKING PROCESS AND SHOULD NOT BE GIVEN DEFERENCE BY THE COURTS

The purpose of both the negotiated rulemaking process and notice-and-comment rulemaking is to allow consumers, business interests, and other interested persons to have input into an agency's regulations. *Amici* represent constituents who traditionally have little political power and whose right to be heard in administrative procedures that lead up to the promulgation of rules is of special importance. Consumer groups, including these *amici*, have consistently expressed concern at the industry's efforts to legalize predatory lending practices. Testimony at one recent Senate Committee hearing on predatory lending practices was replete with statements from persuasive witnesses that HUD's unilateral action in its 2001 Policy Statement had opened the door to the abusive use of yield spread premiums. Chairman Paul Sarbanes of the Senate Banking Committee presided over the hearings, including the hearing that specifically addressed the abuse of the yield spread premiums. Senator Sarbanes noted during the hearing that the reasonableness test found in HUD's 2001 Policy Statement "undercuts" the "plain language of the law, the regulations, the 1998 Congressional instructions to HUD . . . , and the 1999 HUD Policy Statement . . . [which]

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loan." *Predatory Mortgage Lending Practices — Abusive Uses of Yield Spread Premiums: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs* (Jan. 8, 2002) ("2002 Senate Hearing") (Prepared Statement of Prof. Howell E. Jackson, Finn M.W. Caspersen and Household International Professor of Law and Associate Dean for Research and Special Programs, Harvard Law School ("Jackson's Statement"), *available at* http://www.senate.gov/~banking102_01hrg/010802/index.htm).

all make it clear that RESPA was intended to prohibit all payments that are not . . . for actual services provided." 2002 Senate Hearing, Tr. 5-6, 101; *see also id.* at 99-100 (Congress refused to grant HUD the authority to determine the reasonableness of fees when "they passed the legislation"); *id.*, Opening Statement of Chairman Paul S. Sarbanes, *available at* http://www.senate.gov/~banking/02_01hrg/010802/sarbanes.htm.

Representatives of the Mortgage Bankers Association ("MBA") and the National Association of Mortgage Brokers conceded during the hearing that it would be impossible for HUD to judge the "reasonableness" of individual yield spread premium payments. 2002 Senate Hearing, Tr. 100. Professor Howell E. Jackson of the Harvard Law School testified, "[W]hat we discovered [in the empirical study of Respondents' loan transactions] is the vast majority of yield spread premiums goes simply to increase the compensation of mortgage brokers. They do not go to reduce up-front costs." *Id.* at 82; *see also id.*, Jackson's Statement (Pet. App. 191a). Testimony also revealed that HUD was sorely misinformed as to the actual use of yield spread premiums by lenders such as Respondents. *See* 2002 Senate Hearing, Tr. 39-47.

HUD's "behind closed doors" formulation of the 2001 Policy Statement effectively circumvents the formal rulemaking process mandated by the Administrative Procedure Act ("APA"). HUD did not have authority under the APA to issue a policy statement that effected a change in the law without affording the public an opportunity to comment. *See* 5 U.S.C. §§ 551 *et seq.*

It is also clear that HUD's action came as the result of pressure from the industry, with no corresponding opportunity by consumers and the general public to have any input. *Amici* have learned that the MBA, an agent and representative of and lobbyist for lenders, lobbied HUD, after the publication of the Eleventh Circuit's *Culpepper III* decision, to strike the "for" language of the RESPA statute

and HUD's 1999 Policy Statement in its proposed 2001 Policy Statement. Indeed, the MBA provided HUD with a redlined version of HUD's 1999 Policy Statement, from which it struck out all of HUD's references requiring the lender making a payment "for," or in exchange for, services that the broker provided to the lender. *See* Pet. App. 112a-154a. The request for these changes refutes any claim that either the 1999 or the 2001 Policy Statement created a settled interpretation of RESPA. There is simply no way to reconcile HUD's 2001 interpretation with the 25 years in which HUD consistently concluded that referral payments are illegal under RESPA § 8(a) regardless of whether the total compensation received by the referring party is "reasonable."

Even if HUD's 2001 Policy Statement could be squared with the plain meaning of the statute, which it cannot, there is no congressional delegation of authority that could conceivably entitle HUD's Policy Statement to *Chevron* deference under these circumstances. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The 2001 Policy Statement did not derive from HUD's delegated lawmaking powers; rather, it was a unilateral fix to stop a growing number of class action lawsuits. When an agency utilizes such informal means of interpreting regulations, its pronouncements are not entitled to the deference afforded to pronouncements that derive from delegated lawmaking powers. *Martin v. Occupational Safety & Health Review Comm'n*, 449 U.S. 144, 157 (1991). The fact that HUD here has encroached on matters traditionally assigned to the Judicial Branch in interpreting the scope of private rights of action is all the more egregious. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990); *see generally* Pet. 16-18.

Likewise, HUD's 2001 Policy Statement does not comport with the factors set out in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The 2001 Policy Statement is glaringly inconsistent with HUD's previous administrative interpretations regarding what constitutes a violation of

RESPA § 8(a). Until 2001, HUD had consistently asserted that a payment made in exchange for the referral of business was illegal, period.

When viewed through the prism of HUD's repeated inability to promulgate regulations under RESPA § 8(a), it becomes even clearer that HUD succumbed to pressure from the industry and adopted informally what it could not promulgate through the procedures prescribed in the APA. HUD has not materially revised the regulations at issue here since 1992, when it concluded a four-year-long rulemaking, with new regulations that, among other things, required yield spread premiums to be disclosed on the federally mandated HUD-1 disclosure form. *See* 24 C.F.R. Pt. 3500. In response to industry objections that yield spread premium disclosure would be confusing to borrowers, HUD conducted a negotiated rulemaking from December 1995 to May 1996 designed to reach a consensus among consumer groups and the mortgage industry regarding the legality of yield spread premiums under RESPA. *See Real Estate Settlement Procedures Act (RESPA) Disclosure of Fees Paid to Mortgage Brokers; Proposed Rule and Notice of Proposed Information Collection Requirements*, 62 Fed. Reg. 53912, 53913-15 (1997) ("Proposed Rule"). Consumer groups, including NACA, participated in the negotiated rulemaking.

During the negotiated rulemaking, the consumer groups proposed a regulation that would have allowed lenders to pay yield spread premiums so long as the yield spread premiums were paid pursuant to express agreements between brokers and borrowers containing certain terms and disclosures. The proposed agreement would have stated the broker's total compensation both in dollars and as a percent of the amount financed. The mortgage industry objected, and advocated a rule that would require only disclosing "direct" fees (*e.g.*, loan origination fees) and classifying a transfer of a table-funded loan as a secondary market transaction. *See* Proposed Rule, 62 Fed. Reg. at 53917. Under the mortgage industry's proposals, yield

spread premiums paid in connection with table-funded loans would be *per se* legal.

This attempt by HUD to conduct a negotiated rulemaking failed. As a result of its efforts, however, HUD concluded that "there is confusion in the minds of consumers on the functions of mortgage brokers and the sources of their fees," resulting in higher costs to consumers. *Id.* at 53913. HUD then proposed a rule that would have created a qualified "safe harbor" for lenders that paid a yield spread premium pursuant to an "honest lending contract." By virtue of this contract, the borrower would expressly authorize the lender to make a yield spread premium payment as additional compensation for the broker's services. *Id.* at 53921-22. Again, because of numerous mortgage industry objections, the proposal to impose "an honest lending contract" was not adopted.

Because HUD changed its mind and did not accord the public any formal mechanism for input, the 2001 Policy Statement is not entitled to any deference, and the Eighth Circuit's decision relying on it exclusively to decertify the class should be reversed. For the Eleventh Circuit to have invoked the 2001 Policy Statement to overrule *Culpepper III* is detrimental and deeply offensive to the interests of millions of consumers throughout the country.

CONCLUSION

Amici respectfully urge this Court to grant the petition.

Respectfully submitted,

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No. 02-1432

IN THE
Supreme Court of the United States

DANIEL HEIMMERMANN AND EMILY HEIMMERMANN, BOTH INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

FIRST UNION MORTGAGE CORPORATION
Respondent.

Supreme Court, U.S.
FILED
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BETH A. RICHARDSON
AND
PAMELA C. HIRSCH, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, DAVID L. HIRSCH,
Petitioners,

v.

BANKAMERICA CORPORATION, A DELAWARE CORPORATION, BANK OF AMERICA FSB, INC., A HAWAII CORPORATION, BANKAMERICA MORTGAGE, A DIVISION OF BANKAMERICA FSB, A HAWAII CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080 (1999) 1, 4, 6

Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53052 (2001) ..... *passim*

REPLY BRIEF FOR PETITIONERS

The Eleventh Circuit has deepened an existing circuit conflict by relying on *Satellite Broadcasting* to hold that HUD's 2001 Policy Statement must be given *Chevron* deference and *Culpepper III* must be overruled. Seven circuits have rejected the Eleventh Circuit's approach and held that *Neal*, *Maislin*, and *Lechmere* preclude an agency from overruling a court of appeals precedent on a question of statutory interpretation. Respondents nowhere address those cases or dispute that the question is of exceptional importance to the role of agencies and courts in administering statutes. Instead, they claim this conflict is not implicated here because RESPA is "ambiguous" and all the *Heimmermann* court did was defer to HUD's informal "clarification" of its 1999 Policy Statement.

Respondents' argument contains a dispositive flaw. In *Culpepper I* and *II*, which were rendered *before* HUD issued any informal policy statement, the Eleventh Circuit unequivocally established that RESPA § 8(a) and (c) are unambiguous, and yield spread premiums that are not in exchange for any service provided to the borrower are illegal referral payments. Respondents have no answer to that point. Indeed, they can muster only a single citation to *Culpepper I* and *II* in a lone footnote devoid of analysis. *See* Opp. 6-7 n.3. Yet *Culpepper I* and *II*, on which *Culpepper III* directly relied to uphold class certification, established Eleventh Circuit law on a question of statutory construction that HUD later attempted to overturn. Thus, the decision below squarely implicates the rule of seven circuits that reject agency attempts to overturn circuit precedent on questions of statutory construction.

1. *Culpepper I* and *II* established the Eleventh Circuit's authoritative construction of RESPA § 8(a) and (c), which the court did not find ambiguous. In *Culpepper I*, the court framed the issue as "whether [the lender's] payment of a yield spread premium to [the broker] for the referral of an above par loan is an illegal fee under RESPA or a

valid payment for goods or services." 132 F.3d at 695. Noting that district courts had disagreed about "whether a yield spread premium violates RESPA," the court explained that it would first "determine whether the yield spread premium here was a referral fee." *Id.* "Tracking [§ 8(a)], RESPA is violated if (1) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement business and (3) a referral actually occurs." *Id.* at 695-96.[1] Because the bank made a payment to the broker through the yield spread premium, and the broker referred the loan under an agreement to that lender (instead of another lender), the "yield spread premium . . . was a referral fee, and thus a violation of RESPA, unless the payment falls within one of the exceptions listed in [§ 8(c)]." *Id.* at 696. The Eleventh Circuit found nothing ambiguous about "payment of a thing of value" or "referred" in § 8(a), or in determining whether, in a context identical to the ones at issue here, a yield spread premium violated § 8(a). "[The bank] violated [§ 8(a)] by paying [the broker] a fee for 'directing,' *i.e.*, referring, the Culpeppers' business to a particular lender." *Id.*

Turning to § 8(c), the *Culpepper I* court determined that "the payment of the yield spread premium was not tied to the quantity or quality of the services that [the broker] provided. Rather, the sole determinant . . . was the interest rate on the loan." *Id.* at 697.[2] As the court concluded,

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[1] That test for determining liability arises directly out of § 8(a)'s plain language. By contrast, HUD's two-part "test" in the 2001 Policy Statement, which assesses the "reasonableness" of a broker's "total compensation," does not rest on any words in § 8. *See* Pet. 26 n.23.

[2] Respondents assert in this Court (Opp. 4 n.1) that the rate sheets cannot legally be disclosed to borrowers. Yet nothing in the regulations cited by respondents supports that assertion. Indeed, BankAmerica below represented that "brokers . . . may freely communicate to borrowers the pricing information contained on the rate sheets." BankAmerica C.A. Br. at 8, No. 99-11554-JJ. There is no small irony in respondents' hiding behind the *Truth* in Lending Act to justify failing to provide borrowers with accurate information that would enable them to obtain a lower interest rate. Indeed, even if mere disclosure could obviate the illegality of the payment, which it cannot, the "disclo-

"the only 'service' for which the yield spread premium was compensation was [the broker's] 'service' of referring an above par loan to [the lender]. However, referring loan business, even valuable business, is not a service for which RESPA permits payment. The yield spread premium payment thus violated RESPA." *Id.*

On rehearing, the court unequivocally confirmed that *Culpepper I* had perceived no ambiguity: "[w]e are *duty-bound to apply RESPA as written* to determine whether, under the facts of this case, [the lender's] payment of a yield spread premium was lawful." *Culpepper II*, 144 F.3d at 719 (emphasis added). Respondents do not contest that there is no meaningful distinction between the facts in *Culpepper* and those here.[3]

Instead, respondents seek to hide behind HUD's attempt to find statutory ambiguity where *Culpepper I, II,* and *III* found none. RESPA § 8(a) and (c) are not ambiguous simply because the term "yield spread premium" is not present. The statute plainly prohibits the giving and accepting of "any . . . thing of value pursuant to any agreement or understanding . . . that business . . . shall be referred," unless the payment is "for goods or facilities actually furnished or for services actually performed." 12 U.S.C. § 2607(a) & (c)(2). Indeed, the Seventh Circuit has held that a rental fee can fall within the prohibition of RESPA § 8(a) – the court there found no ambiguity simply because the words "rental agreement" do not appear in § 8. *See Lawyers Title Ins. Corp. v. Dearborn Title Corp.*,

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sures" made by respondents are, at best, opaque to the average borrower. *See* Pet. App. 91a (line 811: "Premium Pricing to POC (600.00) from B of A to AMM"). In each loan here, the yield spread premium was not in exchange for any services rendered to the prospective class members, thus falling squarely within *Culpepper I*'s rule of liability.

[3] Even if *Culpepper I* were limited to its facts (Opp. 6-7 n.3), respondents' payments of yield spread premiums to the prospective class members' brokers would still be illegal under that decision. But *Culpepper I* was not so limited: the Eleventh Circuit "*read RESPA* to prohibit certain transactions." *Culpepper II*, 144 F.3d at 719 (emphasis added). That legal determination applies beyond those facts.

118 F.3d 1157, 1162 (7th Cir. 1997) (Posner, J.). Before HUD issued its two Policy Statements and thereby made agency deference an issue,[4] therefore, the Eleventh Circuit had plainly construed RESPA § 8(a) and (c), discerned no ambiguity, and framed a broadly applicable test for determining when a yield spread premium is illegal.

2. Given *Culpepper I* and *II*'s construction of RESPA, the conflict identified in the petition is squarely presented. A phalanx of circuits plainly disagrees with the Eleventh Circuit's holdings in *Satellite Broadcasting* and *Heimmermann* that an agency *can* overrule circuit precedent that authoritatively construes statutory language. *See* Pet. 19-24. Those circuits reject the notion that an administrative agency has "the power to overrule by regulation a precedent of an appellate tribunal." *Bankers Trust*, 225 F.3d at 1371; *see also* Pet. 22-23 (discussing cases from D.C., 2d, 4th, 7th, 8th, and 9th Circuits).

Respondents do not contest the existence of that circuit conflict at all. Remarkably, they neither discuss nor cite the cases addressed in the petition as conflicting. Nor do they dispute that it is wholly improper for an agency to overturn a court of appeals' precedent authoritatively construing a statute. Instead, respondents place all their eggs in a single basket – mischaracterizing what the Eleventh Circuit did here as construing a supposedly "ambiguous" statute. *See* Opp. 20-22. That bold response, however, is belied by a simple fact that they also ignore: In *Culpepper I* and *II*, the Eleventh Circuit had already

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[4] Respondents claim that "Congress directed HUD" to issue the 1999 Policy Statement, which "Congress . . . expected . . . to carry weight." Opp. 5, 27. In fact, the direction appeared in a conference report issued only by committee members, which was not a statutory enactment by the full Congress and cannot delegate interpretative authority to an agency. *See* Pet. 8 n.7. In *Rostker v. Goldberg*, 453 U.S. 57, 73-74 (1981), by contrast, both Houses had passed language affirming the conference report relied on by this Court. In any event, no member of Congress requested the 2001 Statement: that was HUD's response to pressure from lenders who wanted HUD to repudiate *Culpepper III*'s upholding class certification in a § 8(a) yield spread premium case.

construed RESPA § 8(a) and (c), found no ambiguity in those provisions with respect to the payment of yield spread premiums on facts *identical* to those here, and held that the payments were illegal. *See Culpepper III*, 253 F.3d at 1330 ("Under § 8(a), a payment whose reason is to compensate for referrals is illegal, period.").[5] Thus, this case does not, as respondents erroneously assert, involve a court of appeals "properly defer[ing] to the intervening agency interpretation." Opp. 21. Rather, it squarely presents the question on which there is a seven-to-one split in the circuits – whether an agency's policy statement that seeks expressly to overrule circuit precedent on a question of statutory interpretation is entitled to *Chevron* deference.[6]

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[5] Judges Kleinfeld and Berzon agree that RESPA § 8(a) and (c) are "unambiguous," "the intent of Congress is clear," and the "express language cannot be interpreted away" through the 2001 Policy Statement. *See Schuetz*, 292 F.3d at 1016-17 (Kleinfeld, J., dissenting); *Bjustrom v. Trust One Mortgage Corp.*, 322 F.3d 1201, 1209 (9th Cir. 2003) (Berzon, J., concurring) ("Judge Kleinfeld[] . . . has it exactly right," but concluding that *Schuetz* was binding circuit precedent).

[6] Respondents mischaracterize *Satellite Broadcasting*. *See* Opp. 19. There, the Eleventh Circuit also believed itself compelled to defer to a new agency interpretation and to overrule a prior decision holding that a satellite broadcaster is "a cable system as defined under [17 U.S.C.] § 111." *NBC, Inc. v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467, 1471 (11th Cir. 1991). The *NBC* court was "unpersuaded that 'located in any State' means located entirely within a single state" because "nothing in the words Congress chose" supported the view "that only local cable companies [are] included" in § 111. *Id.* at 1470. In overruling that decision, the Eleventh Circuit held that, because § 111 does not explicitly refer to satellite broadcasters, its earlier decision was not based "upon the statute's 'clear meaning'" and, therefore, this Court's decisions in *Lechmere* and *Maislin* were inapplicable. *Satellite Broad.*, 17 F.3d at 348. The court also noted that adhering to its prior decision "would wed this circuit to [that] decision, while all other circuits" would defer to the new agency regulation. *Id.* Following *Satellite Broadcasting*, the *Heimmermann* court focused on the absence of the words "yield spread premium" in RESPA § 8(a) and (c) and overruled *Culpepper III* to bring itself into line with circuits that had deferred to HUD's 2001 Policy Statement. *See* Pet. App. 5a. *Heimmermann* and *Satellite Broadcasting* thus squarely conflict with *Bankers Trust*,

Even the court below perceived the 2001 Policy Statement as attempting to overrule *Culpepper*'s construction of RESPA: "That we may have determined in *Culpepper III* that *a different interpretation of RESPA* (in our view) is better or more consistent with the *statutory language* does not require – *or even allow* – us to reject HUD's interpretation." Pet. App. 8a (emphases added). The *Heimmermann* court made no effort to defend the merits of the agency's putative construction of the statute (which tracked the wishes of the lending industry and which the court had already expressly rejected in *Culpepper III*). The court nonetheless felt constrained by circuit precedent to reject *Culpepper*'s prior statutory construction: "We also conclude that the rule announced in the 2001 SOP can, in effect, overrule the holding of *Culpepper III*." *Id.* at 9a (citing *Satellite Broadcasting*).[7] Yet that is precisely what this Court and seven circuits have held an agency cannot do. *See Neal*, 516 U.S. at 295 ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."); Pet. 23-24 (discussing cases). Moreover, an

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where the Federal Circuit refused to defer to a Treasury regulation, when doing so would require it to overrule a prior decision that "was based on direct judicial construction of the statute, not deference to the [agency]," even though it "creat[ed] inconsistency with the outcomes in" other circuits that had deferred. 225 F.3d at 1376.

[7] In *Culpepper III*, the Eleventh Circuit avoided clashing with HUD by interpreting the 1999 Policy Statement to accord with *Culpepper I*'s construction of RESPA. *See* 253 F.3d at 1332. But for *Satellite Broadcasting*, *Culpepper III* could have disregarded HUD's statement and held that it had already construed RESPA. *See id.* at 1328 ("centerpiece" of lender's argument was that 1999 Policy Statement "overrules *Culpepper I*'s interpretation of § 8(c)"). HUD's 2001 Policy Statement made a conflict between the agency and the Eleventh Circuit's precedent impossible to avoid, because HUD openly expressed its disagreement with *Culpepper III*. 66 Fed. Reg. at 53054-55. As Judge Easterbrook put it, the Eleventh Circuit decided to "kowtow" to HUD. *Krzalic*, 314 F.3d at 882 (Easterbrook, J., concurring). Instead of following *Satellite Broadcasting*, the court should have applied *Neal*, *Maislin*, and *Lechmere*. *See* Pet. 12-18.

agency cannot "find" ambiguity where none exists. *See, e.g., Whitman*, 531 U.S. at 481.

Respondents offer no reason why this Court should not resolve the conflict by holding that the *Neal* rule applies to precedents established by the courts of appeals.[8] Indeed, respondents urged the court below to adopt the very position that has deepened the conflict.[9]

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[8] Respondents cite seven cases (Opp. 21) that actually confirm the split on whether an agency can compel a court to abandon a precedent authoritatively construing a statute, with the Sixth Circuit appearing to side with the Eleventh Circuit. *See NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1122-23 & n.8 (1997) (distinguishing precedent, but stating, in *dicta*, that it would be compelled to overrule precedent that independently construed National Labor Relations Act and "gave no deference to the Board's reading"). The other cases cited by respondents demonstrate that circuits other than the Eleventh adhere to the position that once a court "directly construe[s] a statute" without reference to an agency interpretation – as the Eleventh Circuit did in the *Culpepper* cases – it is "bound to follow [that] decision[]" notwithstanding a later, contrary agency interpretation. *National Org. of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1374 (Fed. Cir. 2001) (citing *Bankers Trust*). In only one case cited by respondents did the court actually overrule a prior decision, and there the court did so only after finding that its earlier decision held simply that the agency's prior interpretation "was an acceptable reading of the Act." *NLRB v. Bufco Corp.*, 899 F.2d 608, 610-11 & n.5 (7th Cir. 1990).

[9] First Union argued: "[A]s a rational interpretation of [RESPA § 8(a)], this Court *is obliged* to adopt the test articulated by HUD in the 1999 and 2001 Policy Statements. *See* [*Satellite Broadcasting*] (according *Chevron* deference to an agency's interpretation of a federal statute even though at odds with circuit precedent)." First Union Supp. C.A. Br. at 7-8, No. 99-14066-JJ (emphasis added; footnote omitted). BankAmerica made a similar argument. Supp. C.A. Br. at 13, No. 99-11554-JJ (arguing that "procedural situation here is nearly identical to the one presented in" *Satellite Broadcasting*, where Copyright Office "issued a formal policy decision criticizing" the Eleventh Circuit's "interpretation of the Copyright Act" and the court "nevertheless accorded [the agency's views] *Chevron* deference"). By contrast, petitioners have consistently argued to the court below that it should not follow *Satellite Broadcasting* because, unlike the notice-and-comment regulation at issue in that case, HUD's 2001 Policy Statement is not entitled to *Chevron* deference: it lacks the force of law and intrudes on the judiciary's role to administer private rights of action. *See* Hirsch C.A. Reh'g Pet. at 12, No. 00-11837.

3. The Seventh Circuit's decision in *Krzalic* conflicts with the decision below. In asserting the absence of a conflict because *Krzalic* construed RESPA § 8(b) and this case concerns § 8(a), Opp. 28-29, respondents miss the important point: the Seventh Circuit previously had construed § 8(b) – just as the Eleventh Circuit had with respect to § 8(a) – and HUD set out in the 2001 Policy Statement to overrule administratively both decisions. *See* Pet. 25. While the Eleventh Circuit thought it was compelled to abandon its own interpretation, the Seventh Circuit was under no such misapprehension about HUD's authority. Instead, that court adhered to its precedent after finding that HUD had not shown that the court's construction of RESPA § 8(b), in "the context of . . . the commercial . . . activity that the statute is regulating, points to an unreasonable result." *Krzalic*, 314 F.3d at 880.[10]

4. The 2001 Policy Statement is not entitled to *Chevron* deference.[11] HUD encroached on two matters reserved for

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[10] If anything, RESPA § 8(a) is less ambiguous than § 8(b), because (a) prohibits "*any . . . thing of value*" whereas (b) prohibits "any portion, split, or percentage of any charge." This Court has frequently noted the breadth of criminal provisions – and violations of § 8 carry criminal and civil penalties – addressing "anything of value." *See United States v. Sun-Diamond Growers of Calif.*, 526 U.S. 398, 401, 408-09 (1999).

[11] Without quoting the Question Presented, respondents assert that deference is not at issue here. *See* Opp. 22. But we clearly challenge whether the court below erred "in according *Chevron* deference to an informal" policy statement. Pet. i. Neither *Glover* nor *Schuetz* raised the precise issue here, because the Eighth and Ninth Circuits had not construed RESPA prior to HUD's informal policy statements, as the Eleventh Circuit did in *Culpepper I* and *II*. Moreover, respondents' reliance (Opp. 28) on *Auer v. Robbins*, 519 U.S. 452 (1997), is misplaced. There, the Court deferred to an agency's interpretation of its regulations, based on the specificity of Congress's delegation and the principle that deference is due an agency's construction of its own ambiguous regulations. *Id.* at 461-63. Here, that principle does not apply because HUD's regulations (24 C.F.R. § 3500.14 (Pet. App. 66a-70a)) simply mirror the statutory language of § 8 (Pet. App. 48a-51a). *See Cunningham v. Scibana*, 259 F.3d 303, 307 n.1 (4th Cir. 2001) (no deference to agency's informal interpretation of regulation that repeats statutory language), *cert. denied*, 534 U.S. 1167 (2002).

the judiciary – to decide the scope of liability in a private right of action and to determine whether a class can pursue that right. First, HUD purports to exonerate a lender whenever the entire payment received by a broker is "reasonable," notwithstanding that part of that compensation was a referral fee paid pursuant to an agreement with the broker. *See* 66 Fed. Reg. at 53055; Pet. 16. But § 8 says nothing about the "reasonableness" of a plainly illegal "referral fee." It is not the agency's role to contort the words of a statute to relieve a private party from civil liability. *See Adams Fruit*, 494 U.S. at 649 (judiciary is "adjudicator of private rights of action arising under the statute"); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., joined by O'Connor & Kennedy, JJ., concurring in the judgment) (no *Chevron* deference to agency interpretations of provisions "not administered by any agency but by the courts"). Indeed, Judge Easterbrook, concurring in *Krzalic*, noted the Eleventh Circuit's failure to "discuss[] the significance of *Adams Fruit*" and expressed "confiden[ce] that *Heimmermann* . . . erred in thinking that the [2001 Policy Statement] is itself conclusive under *Chevron*." 314 F.3d at 882-83.

Second, HUD purports to tell courts *how to examine the relevant evidence of liability* in private civil actions, thereby interfering with the courts' duty to determine whether a class of plaintiffs meets the Federal Rule of Civil Procedure 23(b)(3) standard that "questions of law or fact common to . . . the class predominate." *See* 66 Fed. Reg. at 53054 (legality of yield spread premium "can only be evaluated in the context of the test HUD established" on loan-by-loan basis). But this Court has stressed that an agency's claim "that Congress contemplated a case-by-case adjudication of claims . . . that is incompatible with class relief" is inconsistent with the court's duty to apply Rule 23 to "'all suits of a civil nature.'" *Califano*, 442 U.S.

at 698-99, 700; *see* 12 U.S.C. § 2605(f)(2) (class action provisions under RESPA).[12]

Third, the 2001 Policy Statement lacks the formality to warrant *Chevron* deference. *See* Pet. 17-18. Nothing in RESPA § 19(a) delegates authority to HUD to issue informal policy statements with respect to the private right of action in § 8(d). HUD's general authority to issue "interpretations" does not empower the agency to pretermit a court's consideration of whether evidence of a standard agreement supports certifying a class to challenge yield spread premiums paid without any link to services rendered.[13] *See also Krzalic*, 314 F.3d at 882 (Easterbook, J., concurring) ("[I]n private litigation *Chevron* does not give any force to a declaration unaccompanied by the formalities of rulemaking or administrative adjudication.").

CONCLUSION

The petition for a writ of certiorari should be granted.

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[12] Respondents' suggestion that it "remains the exclusive province of the courts" to apply the Rule 23(b)(3) standard (Opp. 24) is contradicted by its recognition that deference to HUD's 2001 Policy Statement necessarily precludes class treatment (Opp. 12).

[13] Respondents invoke § 19(a) and (b) without responding to our explanation that those provisions do not apply here. *See* Pet. 18 n.13 & 14. The more specific provision of § 8(c)(5) requires *regulations* if HUD wishes to exempt certain payments from § 8(a), and the 2001 Policy Statement is not a regulation. *See* Pet. 18 n.14. Interpretations under § 19(a) do not warrant *Chevron* deference because they are "not binding." *Graham Mortgage*, 740 F.2d at 421-22. *See* Pet. 18. A "nonbinding rule" "do[es] not have the force and effect of law," Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law*, 116 Harv. L. Rev. 467, 477 (2002), which is a prerequisite for deference, *see* Pet. 17-18. Nor does the 2001 Policy Statement have the force of law under the factors identified in *Barnhart v. Walton*, 122 S. Ct. 1265 (2002): the legal question is not "interstitial," whether the fee must be in exchange for services is not complex, and the 2001 Policy Statement was not the result of consideration "over a long period of time," but instead was a hasty effort to overrule *Culpepper III*. *Id.* at 1272. Finally, RESPA's safe harbor does not apply (Opp. 27) because the yield spread premiums here were paid *before* HUD issued its 2001 Policy Statement. *See* Pet. 18 n.13.

Respectfully submitted,

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